FILE COPY

Office-Supreme Court
FILED
AUG 1 9196
JOHN F. DAVIS, CL

No. 63

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,
Petitioner,

v.

W. M. WEBB, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AND APPENDIX FOR THE RESPONDENTS

JOSEPH J. LYMAN
1200 18th St. N.W.
Washington, D. C. 20036
Attorney for the Respondents

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
Question Involved	1
Statutes and Regulations Involved	2
Statement	2-12
Summary of Argument	12-19
Argument:	
INTRODUCTION	19-22
I a. Whether an individual is an employee or an Independent Contractor, the effect of the relationship between the tax sections and the benefit sections of the Social Security Act is the same—they emphasize the underlying purpose of the legislation, i.e. the protection of its beneficiaries from some of the hardships of existence.	19
b. The sole basis for determining respondents' liability for FICA and FUTA taxes was whether the fishermen on respondents' boats were "employees" according to the criteria contained in the Treasury Regulations implementing §§ 3121(d) and 3306(i), Internal Revenue Code	23
LEGISLATIVE HISTORY	27-46
c. When the Social Security Act was adopted in 1935 it set forth no specific definition of the term "employee".	27
(i) 1935-1938: The Social Security Act limited coverage. The Treasury Department's definition of "employee" promulgated in 1936 by the Regulation remains virtually unchanged today.	27

Page

(ii) 1939-1947: Benefits allowance coverage was extended to additional occupational groups but the definition of "employee" remained unchanged, despite attempts to broaden it. Maritime personnel were included in social security coverage on the same basis as other occupations. 29

(iii) 1947-1949: The aftermath of this Court's decisions in United States v. Silk and Harrison v. Greyvan Lines (331 U.S. 704) and Bartels v. Birmingham (332 U.S. 126) caused Congress to amend the Code and define "employee" for the first time in unequivocal statutory language. 33

(iv) 1950-1953: The 1950 amendments extended coverage to include the self-employed, alleviating the problem for inventing a colorable legal theory or a practical reason to create artificial employer-employee relationship on the basis of need. 42

(v) 1954—Fishermen on vessels under 10 net tons were included under FICA and SECA, but excluded under FUTA. 45

(vi) 1967: Congress rejected the Treasury's recommendation to amend the definition of "employee" to include fishermen under FICA. 45

II a. That the Captains and Crewmen were Employees of the Respondent Owners in contemplating the formers' Rights under Maritime Law is irrelevant when deciding the Respondents' Employment Tax Liability determined by the Definition of "Employee" under Sections of the Internal Revenue Code. 46

Page

b. The administrative Ruling (SST 387) was invalid as an Attempt at Enlargement of §§ 3121(d) and 3306(i), Internal Revenue Code, thus impinging upon the congressional Prerogative of Definition. 52

c. There was no Conflict between the moving Principles of the Fifth Circuit's Decision here and that of the Court of Claims reaching a contrary Result. 54

d. "The terms 'Employment' and 'Employee' are to be construed, not in a restricted Sense, but so as to accomplish the Purposes of the Legislation involved." 55

e. Congress' Admonition against taking a restricted View of the Employer-Employee Relationship in making Coverage Determinations under the Social Security Act, concerned Congress' desire to give Coverage to four Categories of non-Employees, by special Amendment, leaving unchanged the Common Law Test for determining who were Employees generally. 58

f. Neither the absence of a demise charter nor the respondents' possible liability to third parties for acts of the crew render respondents liable for the FICA and FUTA taxes in issue. .. 61

g. If the Fishermen (Captains and Crewmen) are not Respondents' Employees, it does not follow that the Crewmen are the Captain's Employees. 62

h. The Fifth Circuit's Decision below cannot jeopardize the Application of the National Labor Relations Act to any Industry. 63

III a. The findings and conclusions of the District Court affirmed by the Court of Appeals were amply supported by the evidence. 65

Page

b. The Court of Appeals having treated the case as an issue of fact rather than a question of law, correctly affirmed the District Court's findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure. 77

Conclusion 85

APPENDIX CONTENTS

Appendix "A"

Statutes and Regulations:

Internal Revenue Code of 1954—

§ 1401 ..... 8A
§ 1402 ..... 9A
§ 3121 ..... 1A
§ 3306 ..... 3A

Regulations, 26 CFR—

§ 1.1401(a) and (b) 9A
§ 1.1402(a)-1; (b)-1; and (c)-1 ..... 10A-11A
§ 31.3121 (d)-1 ..... 4A-6A
§ 31.3306(i)-1 ..... 7A-8A

Appendix "B"

Senate Report No. 1255, 80th Congress 2nd Sess., reprinted from 2 U.S. Code Congressional Service and Administrative News (1948), with reprint's original pagination, pp. 1752-1775 retained 1752-1775

Appendix "C"

U.S. Department of Health, Education, And Welfare, Social Security Administration: Social Security Handbook—SSI-135 February, 1969, Chapter 11, § 1101 ..... 1C

Cases Cited

Alaska Salmon Industry, Inc. (3 cases), 81 NLRB 1335; 82 NLRB 1056; 110 NLRB 900 64
Aguilar v. *Standard Oil Co.*, 381 U.S. 724 48

Page

Atlantic Fishermen's Union, et. al v. *United States*, 197 F. 2d 519 and 195 F. 2d 1021 (CA-1) 64
Baker v. *Texas, Pac. Ry. Co.*, 359 U.S. 227 83
Barrett v. *Phinney*, 278 F.Supp. 65 (Tex.) 46, 55
Bartels v. *Birmingham*, 332 U.S. 129 ..... 26, 33, 34, 35, 39, 54, 81
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 65
Cape Shore Fish Co. v. *United States*, 330 F. 2d 961 (Ct.Cl.) 54, 55
Capital Trawlers, Inc. v. *United States*, 216 F. Supp. 440, aff'd. 324 F. 2d 506 (CA-1) 54, 83
Casement v. *Brown*, 148 U.S. 616 69
Chicago, Rock Is. & Pac. Ry. Co. v. *Bond*, 240 U.S. 449 72
CIR v. *Duberstein*, 363 U.S. 728 ..... 78, 79
Comstock v. *Group of Institutional Investors*, 353 U.S. 211 82
Continental Bus System, Inc. v. *NLRB*, 325 F. 2d 267 (CA-10) 75
Corn Products Ref. Co. v. *CIR*, 350 U.S. 46 82
Cortes v. *Baltimore Insular Line*, 287 U.S. 367 48
Crawford Packing Co. v. *United States*, 228 F. Supp. 549 (Tex.) 54
Crossett Lumber Co. v. *United States*, 79 F. Supp. 20 (WD Ark.) 38, 40
Dimmitt, et. al v. *Finnegan*, 179 F.2d 882 (CA-8), cert. den. 340 U.S. 823 ..... 38, 74
Dixon v. *United States*, 381 U.S. 68 53
Emard v. *Squire*, 58 F.Supp. 281 (Wash.) 54
Enochs v. *Williams Packing Co.*, 370 U.S. 1 ..... 2, 23, 24, 58, 64
Glenn v. *Beard*, 141 F. 2d 376 (CA-6); cert. den. 323 U.S. 724 32
Goodyear Tire and Rubber Co. v. *Ray-O-Vac Co.*, 321 U.S. 275 78
Grace v. *Magruder*, 148 F. 2d 679 (CA-DC); cert. den. 326 U.S. 720 32
Gulf Coast Shrimpers & Oystermen Ass'n. v. *United States*, 236 F. 2d 658 (CA-5) cert. den. 353 U.S. 927 64

Page

Harrison v. *Greyvan Lines, Inc.*, 331 U.S. 704 ..... 26, 33, 54
Helvering v. *Credit Alliance Co.*, 316 U.S. 107 53
Helvering v. *New York Trust Co.*, 292 U.S. 455 53
Henneford v. *Silas Mason Co.*, 300 U.S. 577 26
Hoosier Home Improvement Co. v. *United States*, 350 F. 2d 640 (CA-7) 78, 79
Hopson v. *Texaco, Inc.*, 383 U.S. 262 49
Illinois Tri-Seal Products, Inc. v. *United States*, 353 F. 2d 216 (Ct.Cl.) 35, 36, 38, 55, 77
Iselin v. *United States*, 270 U.S. 245 53
Jackson v. *Phinney*, 266 F.Supp. 636 (Tex.) 55
James v. *United States*, 366 U.S. 213 60
Jamison v. *Encarnation*, 281 U.S. 635 49
Joe Grasso & Son, Inc. v. *United States*, 42 FRD 329, aff'd. 380 F. 2d 749 (CA-5) 63
Jones v. *Goodson*, 121 F. 2d 176 (CA-10) 32
Kirkconcell v. *United States*, 347 F. 2d 260 (Ct. Cl.) 54, 55
Lehigh Valley Coal Co. v. *Yensavage*, 218 Fed. 547 (CA-2) 66
Lifetime Siding Co. v. *United States*, 359 F. 2d 657 (CA-2), cert. den. 385 U.S. 921 ..... 78, 79
Local 36 of the Int'l. Fishermen's Union v. *United States*, 177 F. 2d 320 (CA-9), cert. den. 339 U.S. 947 64
Local 1976 U.B.C. & J. v. *NLRB*, 357 U.S. 93 ..... 51, 62
Lynch v. *Tilden Produce Co.*, 265 U.S. 315 53
McAllister v. *United States*, 348 U.S. 19 48
McGowan v. *Lazeroff*, 148 F. 2d 512 (CA-2) 32
Magruder v. *Yellow Cab Co.*, 141 F. 2d 324 (CA-4) 62
Manhattan General Equipment Co. v. *CIR*, 297 U.S. 129 ..... 50, 53, 62
NLRB v. *Hearst Publications*, 322 U.S. 111 ..... 32, 50, 51
NLRB v. *United Insurance Co.*, 390 U.S. 254 80
O'Hara Vessels, Inc. v. *Hassett*, 60 F.Supp. 672 (Mass.) 54
Party Cab Co. v. *United States*, 172 F. 2d 87 (CA-7), cert. den. 338 U.S. 818 ..... 37, 38, 72

Page

Phinney v. *Southern Warehouse Corp.*, 212 F. 2d 488 (CA-5) 71
Radio City Music Hall, Inc. v. *United States*, 135 F. 2d 715 (CA-2) 29, 32, 66, 69, 75
Railroad Co. v. *Hanning*, 15 Wall. 649 23
Rayhill v. *United States*, 364 F. 2d 347 (Ct.Cl.) 48, 49, 55
Road Improvement District v. *Missouri Pac. Ry. Co.*, 274 U.S. 188 82
Service Trucking Co. v. *United States*, 347 F. 2d 671 (CA-4) 78, 79
Silver v. *United States*, 131 F.Supp. 209 (N.Y.) 77
Singer Mfg. Co. v. *Rahn*, 132 U.S. 518 ..... 23, 29
Smith, Inc. J. Howard, 95 NLRB 21 64
Snow Canning Co., Inc., F. H., 118 NLRB 284 64
Southern Shellfish Co., Inc., 95 NLRB 957 64
Standard Oil Co. v. *Anderson*, 212 U.S. 215 70
Star Fish & Oyster Co. v. *United States*, 223 F. Supp. 402 (Ala.) 54
Texas Co. v. *Higgins*, 118 F. 2d 636 (CA-2) 32, 66
Texas and New Orleans Ry. Co. v. *Brotherhood of Railway and S.S. Clerks*, 281 U.S. 548 78
Thor Co., et. al v. *United States*, 173 F.Supp. 65 (Mass.) 49
Trust of Bingham v. *CIR*, 325 U.S. 365 80
United States v. *Aberdeen Aerie*, 148 F. 2d 655 (CA-9) 32
United States v. *Appalachian Elec. Power Co.*, 311 U.S. 377 82
United States v. *Crawford Packing Co.*, 330 F. 2d 194 (CA-5) 38, 40, 54, 79, 83, 84
United States v. *Joe Grasso & Son, Inc.*, 380 F. 2d 749 (CA-5) 63
United States v. *Mutual Trucking Co.*, 141 F. 2d 655 (CA-6) 32
United States v. *Real Estate Boards*, 339 U.S. 485 ..... 67, 70
United States v. *Silk*, 331 U.S. 704 ..... 26, 29, 33, 35, 39, 54, 68, 72, 81
United States v. *Standard Oil Co.*, 332 U.S. 301 ..... 59, 60
United States v. *Thorson*, 282 F. 2d 157 (CA-1) 35, 37, 38, 49, 72

Page

United States v. *U.S. Gypsum Co.*, 333 U.S. 364 67
United States v. *Vogue*, 145 F. 2d 609 (CA-4) 32
United States v. *Wholesale Oil Co.*, 154 F. 2d 745 (CA-10) 32
United States v. *Yellow Cab Co.*, 338 U.S. 338 67
Venneri v. *United States*, 340 F. 2d 337 (Ct.Cl.) 71
Westover v. *Stockholders Publishing Co.*, 237 F. 2d 948 (CA-9) 55, 56
Williams Packing Co. v. *United States*, Civil No. 2631 (SD Miss.) 55
Williams Packing and Navigation Co. v. *Enochs*, 176 F.Supp. 168 (Miss.), aff'd. 291 F. 2d 402 (CA-5) 54, 83, 84

Statutes At Large:

41 Stat. 988, Sec. 33 48
49 Stat. 450, Sec. 2 65
49 Stat. 620, c. 531 ..... 27, 28, 52
53 Stat. 1360, c. 666 ..... 30, 32
61 Stat. 137 65
62 Stat. 438, c. 468 ..... 36, 60
64 Stat. 477, c. 809 ..... 32, 43
68 Stat. 1052, c. 1206 45

United States Code:

Title 26 §§ 480-482 32
Title 26 § 1426(b) 36, 45
Title 26 § 1426(d) 30, 43, 52
Title 26 § 1607(c) 45
Title 26 § 1607(i) 36
Title 26 § 3121 et seq 1, 63
Title 26 § 3121(d)(2) 40, 52, 53, 56, 58, 81
Title 26 § 3306 et seq. 1, 63
Title 26 § 3306(i) 40, 52, 53, 56, 81
Title 26 § 7702 59
Title 29 § 152(3) 64, 65
Title 42 Supp. IV § 140 32
Title 46 § 688 48

Federal Rules of Civil Procedure:

Rule 52(a) 19, 67, 78, 80

Page

Internal Revenue Code, 1939:

§§ 480-482 ..... 43, 44
§ 1426(b) 45
§ 1426(c) 45
§ 1426(d) 28, 36, 43, 44
§ 1426(d)(3)(A)(B)(C)(D) 43, 44
§ 1607(i) 28, 36
Chapter 1, subchapter E. 44

Internal Revenue Code, 1954:

§ 1401, et seq. 21, 32, 44
§ 1402(c) 44
§ 3121 et seq. 1, 2, 21
§ 3121(a)(7) 65
§ 3121(b) 21, 45
§ 3121(d)(2) 2, 23, 25, 26, 40, 43, 44, 46, 80
§ 3121(d)(3)(A)(B)(C)(D) 42, 43, 44, 45, 53, 58
§ 3306 ..... 1, 2
§ 3306(c) 21, 45
§ 3306(i) 2, 23, 25, 26, 40, 46, 80
§ 7805 52

Treasury Regulations:

26 CFR 1.1402(c)-1 44
26 CFR 31.3121(a)(7) 65
26 CFR 31.3121(d)-1 ..... 2, 23, 24
26 CFR 31.3121(d)-1(c)(3) 13, 84
26 CFR 31.3306(i)-1 2

Employment Tax Rulings:

1951-1 CB 95 43
1951-1 CB 97 43
1951-1 CB 99 43
1951-1 CB 103 43
1951-1 CB 108-109 74
1951-2 CB 162-168 ..... 37, 74

Page

House Reports

No. 615, 74th Cong. 1st Sess. 27, 28
No. 728, 76th Cong. 1st Sess. 31
No. 1461 (Conf.), 76th Cong. 1st Sess. 31, 32
No. 245, 80th Cong. 1st Sess. 65
No. 1319, 80th Cong. 2nd Sess. 36
No. 2168, 80th Cong. 2nd Sess. 40
No. 12080, 90th Cong. 1st Sess. 46
No. 1030 (Conf.) 90th Cong. 1st Sess. 46

Senate Reports

No. 628, 74th Cong. 1st Sess. 28
No. 734, 76th Cong. 1st Sess. 30, 31
No. 1255, 80th Cong. 2nd Sess. 28, 29, 31, 35, 38, 59, 66, 82, 85
No. 1669, 81st Cong. 2d Sess. 42, 43
No. 744, 90th Cong. 1st Sess. 46

Hearings

Committee on Ways and Means, 76th Cong. 1st Sess. Vol. 1 56
Committee on Ways and Means, 81st Cong. 1st Sess. Part 2 ..... 40, 42, 57

Miscellaneous:

1 Fed. Reg. Part 1 (1936) 28
1 Fed. Reg. Part 1 (1937) 2
12 Fed. Reg. 7966 (1947) (Part [b]) 35
8 Am. Jur. 2d; Bailments, § 4 61
S.S.T. 387 ..... 52, 53
1 *Benedict On Admiralty* 48
Broden, *Employment Relations Under Social Security*, 33 Temple L.Q. 307 19
Gilmore & Black, *The Law of Admiralty* 1957 ed. .. 48, 61
Griswold, *Cases and Materials on Federal Taxation* (6th ed., 1966) 50
Larson, *Workmen's Compensation*, § 43.42 (1967 ed.) 48
Unemployment Insurance Rept. (CCH, 1969) ¶ 10,416 25

Page

Vol. 32, Supreme Court Records and Briefs, October Term 1961, No. 493, Petition, p. 7, and Government Brief at pp. 23-24 84
Federal Insurance Contributions Act (FICA) 1, 12, 14, 21, 42, 43, 44
Federal Unemployment Tax Act (FUTA) 1, 12, 21
Joint Resolution 296, June 1948 (80th Cong. 2nd Sess.) 36, 60
Jones Act 48, 49, 50, 52
Merchant Marine Act, 1920, c. 250 48
National Labor Relations Act 63
Old Age, Survivors and Disability Insurance (OASDI) program 14, 21, 28, 43, 58
Public Law No. 642 (80th Cong. 2nd Sess.) 36
Self Employment Compensation Act (SECA) 12, 14, 21, 43, 44, 58

Social Security Act .....
§ 209(b) 30, 32
§ 1101(c) 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 63

UNITED STATES OF AMERICA,
Petitioner,

v.

W. M. WEBB, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS

QUESTION INVOLVED

The concurrent decisions of two courts below held that respondents, owners of commercial fishing boats, were not liable for the payment of employment taxes[1] based on the earnings of fishermen (captains and crewmen) who operated the boats. The resolution of respondents'

[1] This consists of the excise tax portion paid by employer on the earnings of employees under the Federal Insurance Contributions Act (FICA), §§ 3121 et seq., Internal Revenue Code, 26 USC §§ 3121, et seq. It also includes the taxes paid on earnings when an employer has four or more employees under the Federal Unemployment Tax Act (FUTA) § 3306 et seq., Internal Revenue Code, 26 USC §§ 3306, et seq.

tax liability lies in the answer to the question: Were the fishermen operating respondents' boats respondents' "employees," as that term is defined by the provisions of §§ 3121(d)(2) and 3306(i), Internal Revenue Code, which specifically adopts the common law test for ascertaining the employer-employee relationship.[2]

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Sections 3121 and 3306, Internal Revenue Code of 1954 and Sections 31.3121(d)-1 and 3306(i)-1 of the Treasury Regulations on Employment Tax are printed in Appendix "A", *infra*, pp. 1A-8A.

STATEMENT[3]

Petitioner has stated the facts selectively, making fleeting references to a number of the Court's findings of fact and ignoring others. The abbreviated treatment of the district court's findings and the infusion of other facts not found by the Court below, but which petitioner says are compelled by the evidence, requires that the facts essential to a decision here be stated at length. In so doing, portions of findings included in petitioner's statement are necessarily repeated.

Each of the respondents, with the single exception of a partnership, was a corporation, organized under the laws of the State of Louisiana. (Fdg. 1 R. 315-316) Each respondent owned one or more menhaden boats and during the period involved was engaged in commercially fishing for menhaden, a non-edible fish. Respondents' business activities embraced (a) the ownership of menhaden fishing boats; (b) the fishing for menhaden under arrangements with captains on terms and conditions hereinafter set out and (c) the processing of menhaden into

---

[2] *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 3.

[3] Record references to District Court findings of fact: (Fdg. —— R. ——); references to the record otherwise: (R. ——).

fishmeal products for later sale on the open market. (Fdgs. 2-7 R. 316-317)

There were several separate steps in the fishing and subsequent processing of fishmeal products before they were marketed. First, the respondent boat companies contracted with captains to gather the fish. To this end, the respondents furnished a boat equipped for fishing. A respondent-owner relinquished control of the boat to the captain who staffed and provisioned it as he saw fit without interference by the owner. In return, the captain agreed, without a guarantee of earnings of any kind, to make fishing trips for the season, return the catches to a plant designated by the owner and unload and sell his fish to the owner at an agreed price per catch. The respondent-owner would then contract with a processing plant for processing the fish purchased from the captain. The fish would then be processed into fishmeal and related products and sold on the open market. The proceeds from the sale of the end product were divided between the respondent and the plant operator after crediting the venture with expenses and the cost of the fish paid to the captain. The captain had no part in the further business arrangements between the plant operator and respondent-boat owner. (Fdg. 8 R. 317-318) It was part of the arrangement that the captain was responsible for keeping the boat clean, the engines in working order and while in port to keep the boat properly moored, watched and pumped out. The captain received no additional pay for this work, other than the proceeds from the sale of his fish catches to the respondent-owner as hereinafter described. All respondent-captain relationships were substantially the same. (Fdg. 28 R. 325)

The respondents' boats were operated from docking facilities owned by fishmeal processing plants. During this period respondents' boats operated from one or more processing plants located either on the Atlantic Coast or the Gulf of Mexico. Neither the respondent boat companies

nor the fish meal processing plants had a financial or proprietory interest in one another. Individual stockholders of some respondent boat companies may have had a stockholder's interest in some of the plant companies, but not in others. On the other hand, some stockholders of the plant operations had no interest in any of respondents' boat companies. All of the various entities, i.e., respondent boat companies and plant companies, were separate and distinct operations with respect to business matters transacted among them. (Fdg. 11 R. 318-319)

Respondents' boats were equipped by them and operated solely for menhaden fishing, and respondents paid for all repairs. After a boat had been equipped, a respondent would then select as a captain an experienced fisherman to whom the boat would be turned over for the purpose of fishing in the Gulf of Mexico or the Atlantic Ocean. It was understood that the fisherman to whom a boat was let would be its captain and he was so recognized by the respondents. An individual so selected was one in whose honesty and integrity respondents had confidence and trust in his ability to select, supervise and organize the crew of officers and hands to operate the boat and conduct successful fishing operations. (Fdg. 12 R. 319)

The arrangement between the respondents and each captain was oral. Although the term was not specified, it was understood to persist for a fishing season. It could be terminated by either party voluntarily or involuntarily at the conclusion of any trip during a season. This could occur only when a boat was in port and before another fishing trip was commenced. While the arrangement could be so terminated, custom and practice was for it to be continued for the season. (Fdg. 13 R. 320) There was no evidence of termination of any relationship or contract during a season. Ordinarily a captain completed a fishing season before leaving the boat for any reason. But if fish were scarce and the captain could not keep his crew,

a captain would have to terminate the arrangement before the season was over. Termination may also result during a season by reason of the captain's ill health. A respondent may have terminated relations and declined to give a boat to a captain who was unable to produce adequate catches of fish during a prior season. A captain had a right to, and did, contract with respondents' competitors or with a respondent boat owner other than the one whose boat he fished for a prior season. (Fdg. 47 R. 333)[4]

While not formalized by the parties, the arrangement between respondents and the captains constituted an oral contract pursuant to which a captain used a boat belonging to a respondent to go out to fishing grounds and by his own means and methods make catches of menhaden and return them to a designated processing plant for unloading and sale to the respondent at an agreed price per unit of measurement. A respondent's interest in the arrangement was to obtain the largest quantity of fish possible, delivered to a designated processing plant. Respondent in no way interfered with the captain as to the manner and method of accomplishing this result. (Fdg. 15 R. 320-321)[5]

Although the respondents decided the general area to fish, the seasonal presence of the menhaden in a particular area was the determining factor whether the fishing would take place in the Atlantic Ocean or Gulf of Mexico. If there was an option of two places to fish, the captain's preference where to fish was a factor in the joint decision between him and the respondent boat owner. (Fdgs. 16 and 17 R. 321)

Some captains, by choice, fished only in the Atlantic Ocean, others only in the Gulf of Mexico area. Some fished in both areas for consecutive seasons in a single

[4] Pet. Br. p. 4 modified this finding materially.

[5] Petitioner avoided reference to most of this finding.

year, while others fished a single season for the respondents and for competitors at other times. Some captains contracted seasonally with several respondents for the use of their boats over a period of years. There was no pattern of continuity of relationship between particular captains and particular respondents. (Fdg. 18 R. 322) There was nothing in the arrangements between respondents and the captains which assured or guaranteed the captain the particular use of a particular boat or in fact any boat beyond a single fishing season, nor were the captains bound to accept a boat offered by particular respondents once the season ended. Each season was the subject of new and separate negotiations between respondents and the captains. (Fdg. 19 R. 322)

The commencement and termination of a season was a separate and complete arrangement and was so considered by respondents and the captains. All arrangements were understood to be on a season-to-season basis. A new and complete set of personnel and financial records were instituted for each boat for each new season and maintained by the processing plant from which a boat operated during the season. The opening of the processing plants determined the commencement date of a particular season. (Fdg. 20 R. 323)

The respondents during this period determined that a crew of 24 men was necessary for successful fishing. But each captain determined the qualifications of, and selected, his crew which, in this period, consisted of three officers, a cook and 20 net handlers. The captain, in his discretion could and did vary this number, but seldom did because the additional cost would be deducted from his compensation. He sometimes sailed with less than 24 crewmen, but did not without consulting with the respondent-owner. (Fdg. 21 R. 323)

In negotiations for a captain's services, it was understood that the captain would select the crew members. Prior to commencement of a new season, the respondent-

owners would furnish the captains with a pay scale for crew members, and the crew size for the season. If a bonus was to be paid for a season, this information was furnished the captains.[6] (Fdg. 22 R. 323)

Although respondents did furnish a pay scale and a statement respecting crew size to the captains, there was flexibility left with the captains to raise the pay of a particular crew member if he desired, by lowering his own level of compensation. (Fdg. 23 R. 324)

Each captain to the exclusion of the respondents had full charge of his crew and determined such matters as (a) when to depart from port for a fishing trip; (b) when to return; (c) where to fish (that is, the fishing grounds to work); (d) when to fish; (e) how to fish (that is, the actual, mechanical process of putting out the nets, purse boats and other gear); and of all other matters concerning the operation, maintenance and fishing of the boat from the time of departure until its return to unload the catch. The crew took their orders from the captain exclusively. (Fdg. 25 R. 324)

At the completion of a trip, the captain would prepare for another as soon as practicable after unloading. It was to the interest of the parties, as well as the processing plants, to keep the boats fishing as often as practicable. But a boat would remain in port, if in the captain's judgment it was unseaworthy or needed repairs or new nets, or if he considered the weather conditions were unsuitable for fishing. These were left to the captain's discretion. (Fdg. 40 R. 330)[7]

---

[6] While not delineated by the Court, it was clear from the evidence that respondents and the captains considered this publication a safeguard against shifting between crews once a season started. "We tried to produce harmony". (R. 96-97, 98). Bonus were set to keep men from moving from boat to boat." (R. 131) All boats at a plant paid the same scale. "If one man was fishing on one boat and getting more than others, why, that would cause a disturbance, naturally." (R. 198)

[7] Petitioner overlooked the essence of this finding.

Respondents had no right to, nor did they attempt to, instruct a captain or crew as to their actual fishing activity, or how to accomplish it. (Fdg. 27 R. 325)[8] There was no express agreement specifying the extent to which respondents had control over the fishing activities of the captains. It was clear that no actual control was exercised over the details, manner or methods employed by the captains and their crews. (Fdg. 44 R. 332)[9]

Respondents did have the right to control the results of a captain's work and interfered in the process to some degree to assure a proper result from the undertaking. (Fdg. 46 R. 333)[10] The respondents had no control over the crewmen, nor did they exercise any control over the latters' activities through the captains. (Fdg. 49 R. 334)[11]

At the outset of each season, the respondents and the captains who used their particular boats negotiated a price at which respondents would purchase and the captains would sell their catches of fish delivered and unloaded at a designated fish meal plant. (Fdg. 29 R. 325) Payment was made at an agreed rate per unit, i.e. each 1000-fish caught and delivered. (Fdg. 30 R. 326) There was no guarantee of any kind regardless of time or effort expended. Unless a captain caught fish to sell to the respondent, he and his crew had no earnings. (Fdg. 31 R. 326)

The price paid per 1000-fish differed with the seasons and among the various respondents in their separate negotiations with the captains. But the price usually remained constant during a season, irrespective of fluctuations in marketability of the fish meal products produced. (Fdg. 32, R. 326)

---

[8] No reference was made to this finding.

[9] *Ibid.*

[10] Petitioner's brief distorted this finding. (Pet. Br. p. 7).

[11] No reference was made to this finding.

In addition to the price agreed upon and paid per 1000-fish unit, respondents agreed to pay a captain an additional amount as a bonus which was small in relation to the price paid per unit. It was payable only at the conclusion of a fishing season. The amount varied seasonally among the respondents and the various captains according to the total number of fish caught in the entire season. The bonus was divided at the close of the season among the crew in such amounts as the captains and their respective crews negotiated. It was based on the number of fish the particular crewman helped to catch. The respondents had no right to interfere in the negotiations between the captains and crewmen. The bonus served two purposes: First, it stood as a reward or an incentive for the crew to exert greater efforts to increase the size of fish catches, and second, it aided a captain to induce crew members to remain with the vessel to the end of the season to realize the additional money. (Fdg. 33 R. 326-327)

The captain decided how much fuel and groceries to take aboard. Fuel consumed was paid for by the respondent. Groceries were purchased by the captain at a store of his choice and either paid cash or charged them to the boat whereby a bill therefor would be sent to the respondent. At the time of settlement the amount charged against the boat and paid for by the respondent for groceries was deducted from the price paid the captain for the latter's catch of fish. The crew also provided their own personal gear, such as foul weather clothes, boots and other wearing apparel, in keeping with a long-standing custom in the fishing industry. (Fdg. 35 R. 328)

The respondent did not know who the crew members would be at the time they and the captains made their arrangements. Respondents had no record of any crewman's identity until they filled out forms listing them on respondents' records for tax requirements or until the

captain filed his first bi-weekly payroll record with a particular plant. (Fdg. 34 R. 327) The captain kept a daily payroll record of the amount to be paid to each crewman out of the proceeds paid the captain for a particular catch of fish. This daily record reflected who comprised the crew for each catch, the rate paid to each man with variations (if any) to the same man and the number of 1000-fish units of participation in the catch. There was deducted from each crewman's share his portion of the cost of groceries and personal gear charged against the boat, together with any advances made against earnings. The captain turned over this payroll information bi-weekly to the processing plant. The plant's office compiled the captain's data into a single payroll sheet, showing the amounts due the captain and each crewman bi-weekly. Checks were issued by respondents to the captain and each crewman in such amounts as the captain, the respondent and each crew member agreed upon. The checks were delivered to the captain who, in turn, distributed them to the crewmen. If the total amount distributed exceeded the amount a captain received from a respondent for the sale of his catch, the respondent paid no additional amount; the excess was paid out of the captain's pocket. (Fdg. 37 R. 328-329)

Personnel turnover in the crews varied among the boats. Factors determining turnover and relative stability among the crews depended largely upon the captain's ability as a fisherman. The respondents reserved no right to interfere in these matters, nor attempted to do so. (Fdg. 34 R. 327)[12]

Each time and at the time a boat returned to port for unloading at a plant, the trip was over and the work of fishing on that trip was concluded. The captain was then in possession of the catch, which was owned by him

[12] No reference was made to this finding.

and which he agreed to sell to respondents at an agreed price per unit of 1000-fish. (Fdg. 38 R. 329)[13]

During this period the boats were not refrigerated.[14] Fishing trips, particularly in the Gulf of Mexico, usually lasted a single day. The fishing was done in the vicinity of a fish processing plant so that the day's catch could be unloaded readily to avoid spoilage of the fish. Occasionally fishing trips off the Carolina coast in the fall or winter seasons lasted several days where a catch was small and the weather was cold enough in the captain's judgment to preserve the quality of the fish already caught. The boat would then continue fishing until it could return with a large cargo of fish for unloading and sale. Menhaden being very perishable, it was to the interest of the captains and the respondents therefore to unload and make immediate disposition of the catch upon reaching port. (Fdg. 39 R. 330)[15]

If a particular trip in the season was unsuccessful, known in the trade as a "broker", and the value of the catch was insufficient to cover the captain's portion of the expenses of a trip, the captain's portion of expenses would be carried over to succeeding trips to be deducted from the price of the fish paid the captain for subsequent catches. The unpaid expenses were regarded as a personal obligation of the captain. However, if the captain's portion of expenses for groceries charged to the boat was unpaid at the close of the season, the respondents usually paid it. But if bonus money was due the captain, it was sometimes used to pay any outstanding grocery bill. (Fdg. 42 R. 331)

---

[13] Petitioner disagreed with this finding. (Pet. Br. p. 31, fn. 14)

[14] In recent years refrigeration has permitted boats to remain at sea until a captain decided his catch was adequate for unloading. (R. 195)

[15] Petitioner's Brief omitted a pertinent portion of this finding. (Pet. Br. pp. 6-7)

The respondents' boats were equipped with radios through which the captains maintained contact with each other while fishing to aid in finding the schools of menhaden fish. The respondents did not interfere in the captain's use of the communications facilities. The processing plants furnished airplanes and pilots to the venture as spotters and observers to assist the captains in locating schools of fish. Radio communications between the planes and respondents' boats were maintained for this purpose. The captains had the right to accept or reject this service and to exercise their own judgment as it best served their interests. No charge for the plane spotter service was made to the respondents by the plants. (Fdg. 45 R. 333)[16]

The respondents had no agreement with the captains which entitled them to a preferred call on all the time and services of the captains. (Fdg. 48 R. 333)

The District Court concluded that the facts did not constitute a taxable employer-employee relationship under the provisions of the applicable statutes and Treasury Regulations. (R. 335-337) The Circuit Court of Appeals affirmed unanimously. (R. 357-365)

SUMMARY OF ARGUMENT

The Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA) and the Self-Employment Compensation Act (SECA) are the tax sections of the Social Security Act. To determine the respondents' tax liability, the existence or absence of an employer-employee relationship between the fishermen and the respondents must be ascertained. In determining that the relationship was not that of employer and employee, the two courts below used the common law definition of "employee".

---

[16] Pet. Brief p. 6 fn. 5 omits the captains' exercise of discretion.

The Congressionally accepted distinction between an employee and an independent contractor in service relationships exist when the individual for whom services are performed has the right to control and direct the other who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which it is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. Generally, if an individual is subject to the control or direction of another, merely as to the result to be accomplished by the work and not the means and methods for accomplishing the result, he is an independent contractor. Other factors, characteristic of an employer, but not present in every case, are the right of discharge, the furnishing of tools, and a place to work to the one who performs the services. 26 CFR § 31.3121 (d)-1(c), Appendix "A", p. 7A.

The petitioner endorsed Congress' definition of the "usual common law rules" for determining "employee" status in the early part of the Brief. However, it was abandoned later, in favor of criteria giving vitality to the remedial purposes of legislation governing employment relationships which determine liability in maritime and workmen's compensation cases. Both latter concepts are in derrogation of the common law; neither are relevant for making determinations of respondents' tax liabilities under the Internal Revenue Code.

This novel theory was served up as a device to avoid confrontation with the impressive legislative history of the statutes involved which, standing alone, destroys petitioner's theory for transposing self-employed fishermen into colorable "employees" based on their calling as seafarers.

The lure invoking this Court's creative powers to effect the transformation was, in a large measure, petitioner's promise to expose the Circuit Court's decision below as a

vehicle for denying social security benefits to the fishermen. In addition, petitioner contended that the Circuit Court's decision caused dilemmas impairing the agencies' ability to administer the tax aspects of the Act in an even-handed manner.

The petitioner was apparently unaware that the decision below accorded the fishermen, as self-employed persons, the same benefits under the Old Age, Survivors and Disability Insurance (OASDI) program that are accorded common law employees. Also overlooked was the assurance of the Commissioner of Internal Revenue to Congress in 1949 that the agencies were then prepared and equipped to administer the tax sections of the Social Security Act in an even-handed manner whether the taxpayers were common law employees or self-employed persons.

But somewhere between the Petition and petitioner's Brief here on the merits, those promises and contentions dissolved. Permitting form to rise above substance, all that remains is a scholarly brief undertaking to shift tax incidence from one group (the fishermen) under the Self-Employment Compensation Act (SECA), to another group (the fishermen and respondents combined) under the Federal Insurance Contributions Act (FICA), for no apparent reason other than to suit the tax collector's administrative convenience.

I

The legislative history of the Social Security Act from its inception in 1935 to the present, demonstrates a continuous struggle between the proponents of extended coverage and the opponents of change who would limit coverage to common law employees as the Act originally intended. The technical definition of "employee", according to the common law rules, separated many from the Acts' benefits although need was demonstrated. This led to considerable benevolent administrative cleverness

by the agencies who undertook to create colorable employees out of those in the twilight zone between clear employment and entrepreneurial enterprise. Some courts overlooked the common law distinction drawn in the Act and considered only the economic factors involved and the remedial aims and purposes of the statute in deciding the existence or absence of the employment relationship.

The Congress reacted sharply to what it considered a usurpation of its legislative function by the courts and administrative agencies. In 1948 Congress reiterated its unbroken intent that coverage was to be limited to "employees" so defined by the specific terms of a new statute embodying the "usual common law rules". The Congressional debates and Committee reports showed an emphatic rejection of the "economic reality" concepts which had evolved, but there was a ready approval of those decisions which were based on the common law concepts outlined in the Treasury Regulations. Litigation continued to swirl around the term "employee". The proponents of coverage urged its expansion or repeal while the opponents stood firm on the common law test as controlling.

Ultimately, in 1950, the proponents of expanded coverage won the day. By legislative compromise, many groups of non-employees were legislated into the FICA as "statutory employees" and the self-employed were covered into the system by enactment of the SECA. No one, under any theory, was separated from benefits. However, the common law distinction between "employees" and "independent contractors" remained intact. Insofar as benefits coverage is concerned, the difference is no longer significant, but the tax incidence is another matter.

In 1967, the Treasury Department was unsuccessful in its efforts to convince Congress to legislate fishermen into the category of "statutory employees" under the

FICA. Resort to these proceedings intend that this Court should undertake what Congress refused to do.

II

Petitioner argues that Congress intended that fishermen be considered employees under the Social Security Act if they were held to be employees under principles of maritime law. The legislative history of the Social Security Act lends no support to petitioner's theory.

Petitioner observed that the fishermen were entitled to maintenance and cure from the respondent-boatowners by virtue of their status as seamen. From this obligation there arose an employer-employee relationship according to the principles of maritime law. In this posture the petitioner insists that the determination having been made under one law, it should be mechanically carried over into the Internal Revenue Code where it must be interpreted the same way, although the tax statutes involve significantly different considerations and legislative purposes. The novel theory proposed cannot withstand analysis. Nothing in the pertinent tax statutes' background, history, terms or purposes indicates that the term "employee" for tax purposes is to be evaluated according to the determinants applied by the admiralty courts when resolving rights to maintenance and cure.

The Circuit Court below recognized that a realistic application of the common-law tests did not require that the relationship of the owners and the captains and crews be evaluated under principles of general maritime law. The decision recognized the gulf between the standards for determining employer-employee relationships under maritime concepts as opposed to tax considerations under the Internal Revenue Code. The Circuit Court found the captains and crewmen were not the owners' employees when applying the common-law test for tax purposes, but would be their employees under the liberal tests applied to promote the remedial purposes of maritime law.

The sole issue here is whether the fishermen were employees within the meaning of the pertinent tax statutes and not within the meaning of other legislation.

It is generally understood that one may be an "independent contractor" under the common law control test and at the same time may also be an "employee" under remedial legislation relating to maritime or workmen's compensation.

Since 1950, no social or economic purpose under the statute is served by extending the term "employee" beyond the limits fixed by Congress simply to label these self-employed fishermen as employees. Questions respecting inclusions and exclusions in making these determinations are for the Congress to answer not the courts or the executive agencies. Petitioner's evaluation of employer-employee relationships "according to the standards that have been traditionally applied in the context of a particular industry" provide no stated rule by which respondents and others may determine their tax obligations under the Act. Petitioner has shown no logical basis for cross-fertilizing maritime principles with the provisions of the Internal Revenue Code to support its novel contention. The basic purpose for which the definition of employee is used in maritime law is entirely different from the common law purpose.

III

The District Court and the Circuit Court of Appeals applied the conventional common law rules in the statutes and regulations to the findings of fact and concluded that the captains and crewmen on respondents' boats were not respondents' employees for purposes of the Social Security Act. The case presents no constitutional principle so closely connected to the facts of the case to warrant dispensing with the conventional rule of this Court which usually precludes review of the concurrent findings of two courts below.

The findings below, amply supported by the evidence, disclosed an oral contract between the respondent-owners and captains under which the former relinquished control of their boats to the captains. They in turn staffed and provisioned the boats at their own expense, with the understanding that all fishing activities conducted by the captains were to be free from the direction and control of the respondents. The captains made business decisions and each season bilaterally negotiated the price for the sale of fish catches to the owners on delivery. All matters relating to crew hire, hours of work and areas to be fished were the sole prerogative of the captains. All payments to the crew and the cost of provisions and personal gear charged against the boat were the captains' personal debts. Like other independent contractors, a captain's profit or loss depended upon the way he combined efficiency and economy in managing his vessel. There was no guarantee of earnings to the captains and crewmen of any kind irrespective of the time or effort expended. The captains' contract was to produce a specified result. The will of the respondents throughout was represented only in the results of the work not in the means by which it was accomplished. The captains exercised independence and opposed the wishes of the boat owners by affecting changes respecting the crew size and pay scales determined by the respondents. They were unrestricted in their right to conduct similar fishing operations for other boat owners anywhere. There was no right of indiscriminate discharge contemplated or exercised by the parties. The covenants between them constituted an undertaking capable of independent action to be judged by results covering a fishing season. The parties recognized and the record supported the conclusion that each captain was an independent operator, each with an organization of his own, conscious of his own power to direct operations and negotiate the sale of his product.

Petitioner's emphasis on the captains' use of the expensive vessels owned by the respondents as decisive here, loses its force when it is realized that there are many contractual arrangements involving large investments by businesses with little or none by the independent contractor performing necessary services.

While contending the facts were undisputed, and as such called for an opposite result, the petitioner disparaged nearly all the findings made by the two courts below and raised questions whether the evidence sustained the Courts' findings. Ignoring the requirements of Rule 52(a) F.R.Civ.P., the petitioner contended, in effect, that the Courts ignored all of the facts the petitioner deemed significant.

Petitioner's contention that the issue here was basically a question of law, subject to plenary review, is without support in the legislative history or plain words of the statutes and regulations. Furthermore, the decisions of this Court have uniformly considered the determination of employer-employee relationships a matter for the triers of fact.

ARGUMENT

I

INTRODUCTION

a. Whether an individual is an Employee or an Independent Contractor, the effect of the relationship between the tax sections and the benefit sections of the Social Security Act is the same—they emphasize the underlying purpose of the legislation, i.e. the protection of its beneficiaries from some of the hardships of existence.

At its inception in 1935 the Social Security Act covered about half of the labor force. Today, it applies to nearly 90% of American workers.[17] By now, as might

[17] See, Broden, *Employment Relations under Social Security*, 33 Temple L.Q. 307.

be expected, the basic rules applicable to benefits coverage and assessment of corresponding tax liabilities are and should be settled. Yet, in one important area of the Social Security law this is not true. It deals with the special rules applicable in determining the employer-employee relationships, under the Act's benefits sections and the coordinate sections of the Internal Revenue Code, in the deepening twilight zone lying between what is clearly an employee on the one hand, and an individual entrepeneur on the other.

In the beginning, the Social Security program provided for benefits allowances for "employees" only. This excluded, of course, all self-employed persons and those in a class with independent contractors. In making coverage determinations much skirmishing in the courts and executive agencies took place within the area between employees and self-employed persons or independent contractors.

Thus, if one was considered an employee, the liability for the taxes concerned was divided equally between the employee and the party hiring him and, additionally, the worker was entitled to old age insurance benefits under the program. On the other hand, if he was an independent contractor, none of these legal consequences ensued.

In 1950, self-employed persons and independent contractors were brought under the coverage of the program so that now the above distinctions are less meaningful. In all material respects the self-employed or independent contractors became entitled to the same benefits under the social security program as the employee. Only one difference remained: The employee's tax contribution is less than the independent contractor's, and, from the view of the employer, there are no employment taxes imposed if the hired party is classified as an independent contractor.

Prior to the coverage of the self-employed into the social security system, those administering the Act tended to liberalize the "employee *vs.* independent contractor" concept, leaning toward "employee" coverage for those in the twilight zone. Faced with a regulation defining "employee" in legalistic terms, an administrator might consider such regulation a technicality if it would deny coverage. This human reaction found support in a number of court decisions, giving rise to opposing results in "close" cases.

The aims and purposes of the Social Security Act were to insure a measure of economic security in old age to as many as the law permitted. Those benevolent purposes reached fulfillment in 1950 when Congress covered the self-employed into the program. No one,[18] under any interpretation of the Act, is separated from benefits allowances. It is now a tax matter: Who pays the tax? Shall it be shared by the employer and the hired person, or shall the hired person pay his own tax to qualify for his benefits?

As matters stand and as they stood in 1956, the period involved here, common law employees under the Federal Insurance Contributions Act (FICA)[19] and the self-employed under the Self-Employment Compensation Act (SECA)[20] were and are accorded the same benefits under the Old Age, Survivors and Disability Insurance (OASDI) program and hospital care (Medicare). The fishermen, under the decisions below, obviously qualify as self-employed persons under SECA. We attach importance to this owing to an inaccurate statement in the govern-

---

[18] Subject to exempt occupations listed at § 3121(b) and 3306(c), Internal Revenue Code.

[19] §§ 3121 et seq., Internal Revenue Code, Appendix "A" pp. 1A-2A *infra*.

[20] §§ 1401 et seq., Internal Revenue Code, see Appendix "A" p. 8A-9A *infra*.

ments' petition for the writ of certiorari. There it was indicated that:

> "[T]he Social Security Administration, in paying social security benefits, is faced with a difficult situation. It must have a consistent nation-wide policy. The geographic location of an applicant or his work cannot be a basis for *denying benefits.* Thus, the agency had to make a decision of whether to deny benefits to all fishermen or to give such benefits to the entire class. The agency has resolved this dilemma by paying the entire class of workers the benefits regardless of the geographic area in which they perform their services. As a result some people now receive benefits free of any corresponding burden on them or the owners of the boats on which they have worked. * * * But it does, in relation to hundreds of owners and fishermen involved, impose an inequity that presently may be resolved only through review by this Court." (Petition pp. 15-16) (Emphasis supplied)

The suggestion that the decisions below caused inequities, or payment of benefits without collection of taxes, or formed a basis for denying benefits to fishermen, lacks substance. These contentions, whatever their purpose was intended to serve in the petition, were omitted from petitioner's brief here on the merits.

Owners of vessels and mariners generally are unconcerned with proceedings under these statutes. Their employment status under the common law rules is clear. Only the contractual arrangements existing between some fishing boat owners and commercial fishermen, which fall somewhere between employer-employee relationships at common law, and independent contractor, are contested.

b. The sole basis for determining respondents' liability for FICA and FUTA taxes was whether the fishermen on respondents' boats were "employees" according to the criteria contained in the Treasury Regulation implementing §§ 3121(d) and 3306(i), Internal Revenue Code.

The only question here is whether the two courts below reached a proper decision by the application of §§ 3121 (d) (2) and 3306(i), Internal Revenue Code, to the facts. Both acts "specifically adopt the common law test for ascertaining the employer-employee relationship." *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 3. Turning to the applicable legal principles, it is agreed, of course, (Pet. Br. pp. 13, 14, 17) that under the common law test prescribed by the statutes in question, the relationship of employer and employee exists where the principal has the right to direct the manner and method in which the work shall be done, as well as the result to be accomplished, while an independent contractor relationship exists where the individual who performs work for another does so according to his own manner and method, free from direction or right to direction in matters relating to the performance of the work save as to the result. *Railroad Co.* v. *Hanning*, 15 Wall. 649, 656. *Singer Mfg. Co.* v. *Rahn*, 132 U.S. 518, 523.

Thus, the applicable Treasury Regulations which are an authoritative elaboration of the distinction under the common law test between an employee and an independent contractor provide the answer. In pertinent part they state [26 CFR § 31.3121(d)-1]:

> *Who are employees.*
>
> (a) * * *
>
> (c) *Common law employees.* * * *
>
> (2) Generally such relationship [employer-employee] exists when the person for whom the services are performed has a right to control and

> direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. In this connection it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.
>
> * * * *
>
> In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor."
>
> [The full text is at Appendix A, pp. 4A-6A *infra.*]

Petitioner agrees that the control factor is of paramount importance in deciding who are "employees" under the sections. (Pet. Br. p. 17) Also significant, but not necessarily present in every case, are three additional factors: (1) the right of discharge, (2) the furnishing of tools and (3) the furnishing of a place to work to the one who performs the services. 26 CFR § 31.3121(d)-1. Beyond these criteria the Regulations are silent. Additional factors listed in many decisions are: degrees of control, opportunities for profit or loss, investment in the facilities, permanency of the relation and skill required. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 3.[21] Since the inception of the Act, these criteria have been applied by the several federal courts and the Commissioner of Internal Revenue to numerous service rela-

[21] In the absence of congressional expression to the contrary, these and any others must be considered descriptive of the criteria in the existing Regulation as they affect control of the manner and method of performance of the work.

tionships in varied occupations.[22] The contrary results reached in what appeared to be similar situations were in no small measure due to differences in facts and the weight accorded them by the trier of fact.

The petitioner's notions of the evaluation of the employer-employee relationship "according to the standards that have been traditionally applied in the context of a particular industry" (Pet. Br. p. 21) may be weighty when enforcing rights or invoking remedies under the particular laws or precedents regulating such industry. But in the absence of the industry's own definition of "employee", petitioner's "standards", undefined, are meaningless. Unless those "standards", whatever they may be, coincide with Congress' definition of "employee" according to the common law test provided in §§ 3121(d) and 3306(i), Internal Revenue Code, and the implementing Treasury Regulations (Appendix A, pp. 4A-6A), then such "standards" are without significance in determining tax issues. Petitioner has delineated no criteria defining "employees" apart from those in the statutes and Regulations involved here.

In the early part of its brief, petitioner abstractly endorsed Congress' definition of the "usual common law rules" in the statutes and regulations involved. (Pet. Br. p. 13-14). But instead of relying on it, petitioner adopted other criteria as controlling, i.e., principles which determine liability growing out of employment relationships in maritime and workmen's compensation cases. (Pet. Br. 13, 18, 25-26). The tests in both of those categories are in derrogation of the common law. By this device, petitioner seeks to divert attention from the statutes' revealing legislative history, [glossed over in a footnote, (Pet. Br. 15, ftn. 7)] which discards peti-

[22] The annotations in the current Unemployment Insurance Reporter (CCH, ¶ 10,416) disclose uniform application of the statutes and Regulations as the sole test for making the determinations in hundreds of cases.

tioner's novel theory. The legislative history is discussed *infra*, pp. 27-46.

Petitioner labels this concept the "common law of the sea" (Pet. Br. p. 17), perhaps to bring it in line with the term "usual common law rules" contained in the statutes. But the similarity ends in the names. This Court has cautioned against the use of word games in important matters, saying:

> "Catchwords and labels, * * * are subject to the dangers that lurk in metaphors and symbols and must be watched with circumspection lest they put us off our guard." (*Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 586)

Consideration of the questions raised make necessary an examination of the legislative history of the terms, "common law rules" and "employee" contained in §§ 3121(d) and 3306(i), Internal Revenue Code. This history will demonstrate (1) that it was Congress' unbroken intent that the control test was basic to the definition of "employee" in applying the "common law rules" to service relationships; and, that attempts by the Treasury Department and courts to infuse other criteria to extend the meaning of that term were emphatically rejected;

(2) that the applicable sections of the Social Security Act and the Internal Revenue Code make no distinction between an employee for purposes of a tax case involving maritime personnel and any other type of employee, and no distinction was intended; and,

(3) the necessity for invoking an "economic reality" concept prevalent in the early decisions of this Court [23] favoring "employee" status to give coverage where needed, has all but evaporated leaving the issue solely a tax matter.

---

[23] *United States* v. *Silk* and *Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704 (two cases) and *Bartels* v. *Birmingham*, 332 U.S. 129.

Legislative History

c. When the Social Security Act was adopted in 1935 it set forth no specific definition of the term "employee".[24]

(i) *1935-1938: The Social Security Act limited coverage. The Treasury Department's definition of "employee" promulgated in 1936 by the Regulation remains virtually unchanged today.*

When the Social Security Act was passed in 1935 [25] its aims and purposes were benevolent, but its coverage was limited. The term "employment" in the Act was defined broadly as "any service of whatever nature performed within the United States by an employee for his employer." [26]

There followed a list of occupational categories exempted from coverage, one being maritime personnel.[27] Respecting the scope of the Acts, a congressional Committee report observed: "While humanely providing for those in distress, it does not proceed upon the destructive theory that the citizens should look to the government for everything. On the contrary, it seeks to reduce dependency

---

[24] A large part of the legislative history central to this discussion is contained in Senate Rept. 1255, 80th Cong. 2nd Sess. A reprint of the Committee Report in 2 U.S. Code Congressional Service and Administrative News (1948) has been reproduced in full for convenience as Appendix B of this brief, *infra*. The original pagination of the reprint has been retained, which commences with p. 1752 and ends with p. 1775. Any reference made to Senate Report No. 1255 will be designated as (Sen. Rept. No. 1255, see Appendix B, p. ——)

[25] 49 Stat. 620, c. 531; 42 USC, generally disbursed throughout Title.

[26] 49 Stat. 620, 625, § 210(b).

[27] 49 Stat. 620, 625, § 210(b)(4) [exempted from coverage] "Services performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country * * *." The House Report noted that maritime services were exempt from coverage. H. Rept. No. 615, 74th Cong. 1st Sess. pp. 21-22.

and encourage thrift and self-support." H. Rept. No. 615, 74th Cong. 1st Sess., p. 16. The Senate Finance Committee observed: "A considerable part of the population, however, is outside of Title II (Old Age, Survivor's and Disability Insurance [OASDI]) * * * These groups include almost half of all persons 'gainfully occupied' as this term is used in the United States Census." [28]

At the same time, the Act set forth no definition of the term "employee"; Section 1101(c)(6) of the Social Security Act merely specified that it "includes an officer of a corporation." [29]

Little difficulty was experienced in separating clear employment from conventional entrepreneurial activity. However, there were a multitude of other borderline occupations that Congress could not and did not foresee. It was the responsibility of the administrative adjudicatory processes of the Social Security Board and the Treasury Department to pass upon these initially. At the time the Social Security Act was adopted there was no doubt that "employee" had its usual common law meaning.[30] To facilitate the uniform settlement of these disputes, the Treasury Department promulgated regulations (which were substantially the same as the present regulations) interpreting the statutory term "employee" on the basis of the common law control test.[31]

---

[28] S. Rept. No. 628, 74th Cong. 1st Sess., p. 9. The Report continued: "Included in this excluded group are all agriculture workers, domestic servants, employees of charitable, educational and religious organizations, all self-employed persons, farmers, professional people and proprietors and entrepreneurs. * * * Many of these people will not be so greatly in need of old age assistance as the industrial workers to whom Title II is applicable, * * *." (*Ibid*, p. 9)

[29] 49 Stat. 620, 647. The identical language contained in § 1101(c)(6) was carried over to §§ 1426(d) and 1607(i) of the Internal Revenue Code of 1939.

[30] S. Rept. No. 1255, See Appendix B, p. 1755, *infra*.

[31] 1 Fed. Reg. Part 1, p. 1764 (1936), promulgated on November 9, 1936. The Social Security Board promulgated its regulations on

Considering this regulation years later, Judge Learned Hand said in *Radio City Music Hall, Inc.* v. *United States*, 135 F.2d 715 (CA-2) at pp. 717-718:

> "We accept Article 3 of Regulations 91 as an authoritative definition of the distinction between an 'employee' and an 'independent contractor'—it is really no more than a gloss upon the definition contained in Justice Gray's opinion in Singer Manufacturing Co. v. Rahn (132 U.S. 518, 523) * * *. The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said, though the regulation redundantly elaborates it." [32]

Constricted coverage under the Social Security Act was initially evidenced by the exemption of a number of specific categories of conceded employers and employees. Additionally, in the covered categories, individuals in borderline occupations were included or excluded from benefits coverage depending upon how the common law rules were applied to their separate contractual arrangements.

> (ii) ***1939-1947: Benefits allowance coverage was extended to additional occupational groups but the definition of "employee" remained unchanged, despite attempts to broaden it. Maritime personnel were included in social security coverage on the same basis as other occupations.***

In 1939 amendments to the Act extended coverage to a greater number of occupational groups. Among others, maritime personnel were removed from the exempt cate-

---

July 21, 1937 which were identical in all material respects. 1 Fed. Reg. Part 1, p. 1276 (1937). It is reproduced in *United States* v. *Silk*, 331 U.S. 704, 714, ftn. 8.

[32] Congress approved Judge Hand's interpretation of the definition of "employee" and specifically adopted the Treasury Regulation as its common law definition of employee. Sen. Rept. No. 1255, Appendix B, pp. 1755-1756, 1761, *infra*.

gories and covered under the Act.[33] The definition of "employee", however, was continued without change.[34]

Despite petitioner's contentions to the contrary,[35] Congress' intention was clear that the maritime's coverage into the system was to be unaccompanied by special rules. The applicable sections made no distinction between an employee for purposes of a tax case involving maritime personnel and any other type of employee. The Committee Report stated:

> "No substantive change in existing law is made * * * except the extension of the definition to include service on American vessels. * * * Service performed on * * * an American vessel * * * will be on the same basis as regards inclusion as other services performed within the United States." (S. Rept. No. 734, 76th Cong., 1st Sess., pp. 55, 73-74.)

The intention of the Congress that "employee" in the Social Security Act should have its usual meaning under common law rules realistically construed were reaffirmed when the Congress otherwise made fundamental changes in the 1939 Act. Congress "rejected the Social Security Board proposal to enlarge it so as to encroach into the

---

[33] 53 Stat. 1360, c. 666, amended the Social Security Act, § 209(b) to read in pertinent part: "The term 'employment' means any service * * * of whatever nature performed after December 31, 1939 by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States * * *, except—."

[34] 53 Stat. 1360, 1386; 26 USC 1426(d) of the 1939 Code.

[35] Petitioner's Brief p. 20-21: "Nothing in the legislative history fairly ascribes to Congress the anomalous intent of having maritime activities subject to standards, for Social Security purposes, other than those which are relevant to enterprises conducted at sea. Rather, we should suppose Congress intended the employer-employee relationship to be evlauated according to the standards that have been traditionally applied in the context of a particular industry."

field of independent contractors and the self-employed." [36] The proposal was to broaden the definition of employee to cover more persons who furnished primarily personal services, but whose legal status was probably not that of an employee.[37] The Finance Committee, debating whether the term "employee" should have its meaning according to the principles of the common law or should be given a special statutory definition, concluded: "It is believed inexpedient to change the existing law which limits coverage to employees." Sen. Rept. 734, 76th Cong. 1st Sess. p. 75. After conference, the Senate position was upheld.[38] Enacting the bill with no change, Congress adopted the rules for distinguishing employee and independent contractor set out in the existing Treasury Regulations.[39]

There was no difficulty in making clear-cut determinations for social security coverage respecting masters and seamen of the merchant marine with their uniform hiring practices, fixed wages and prescribed routes and schedules. But coverage for fishermen was viewed differently. In the course of the debates the Senate proposed an amendment to exempt all fishermen from coverage.[40] Finally, following a congressional compromise, the amended Act as passed specifically exempted fishermen engaged in commercially fishing for salmon and halibut

---

[36] S. Rept. No. 1255, see Appendix B, p. 1756, *infra*. See also S. Rept. No. 734, 76th Cong. 1st Sess. p. 75.

[37] Hearings, Committee on Ways and Means, 76th Cong. 1st Sess. p. 8; see, also, H. Rept. 728, 76th Cong. 1st Sess. p. 18.

[38] H. Rept. [Conf.] No. 1461, 76th Cong. 1st Sess., p. 14.

[39] Sen. Rep. No. 1255, see Appendix B, p. 1757, and fn. 2, *infra*.

[40] "Amendment No. 40. This amendment would exclude fishermen from coverage. It would also exclude officers and members of crews of any vessel less than 400 tons, or any sail vessel regardless of tonnage if the vessel is engaged in specified fishing activities. There was no comparable provision in the House bill." H. Rept. [conf.] No. 1461, 76th Cong. 1st Sess. p. 9.

and those serving on vessels under 10 net tons.[41] All others in commercial fishing were covered by the Act. But among fishermen in the covered class, a considerable number would, nevertheless, have been excluded from coverage under the 1939 Code, prior to January 1, 1951[42] if it was determined they were not employees by application of the common law rules.

The federal courts, however, applied varying standards in determining who were employees in various occupations: A majority held that the term was to be given its common law meaning;[43] a few ignored the common law test and looked instead to the purposes of the legislation for guidance;[44] and still others looked to both the purposes of the legislation and the common law rules for guidance.[45]

---

[41] H. Rept. No. 1461, 76th Cong., 1st Sess. p. 14 (Amendment No. 93). 53 Stat. 1360, 1373 (42 USC Supp. IV §§ 410, 410a) § 209(b) defines "employment" listing exceptions. Pertinent here is subsection (14) of the exceptions which for our purposes reads: "service performed by an individual in (or as an officer or member of the crew of the vessel while engaged in) the catching * * * of any kind of fish * * *, except (A) service performed in connection with the catching or taking of salmon or halibut for commercial purposes and (b) service performed on * * * a vessel of more than 10 net tons * * *."

[42] The effective date of the 1950 amendments to the Social Security Act, extending coverage to the self-employed. 64 Stat. 477, c. 809. See, 26 USCA §§ 480-482, (1939 Code), renumbered § 1401, et seq., 1954 Code. See, Appendix "A", p. 8A-11A, *infra*.

[43] See, e.g. *Texas Co.* v. *Higgins*, 118 F.2d 636 (CA-2); *Radio City Music Hall Corp.* v. *United States*, 135 F.2d 715 (CA-2); *Jones* v. *Goodson*, 121 F.2d 176 (CA-10); *Glenn* v. *Beard*, 141 F.2d 376 (CA-6); cert. den. 323 U.S. 724; *United States* v. *Mutual Trucking Co.*, 141 F.2d 655 (CA-6); *McGowan* v. *Lazeroff*, 148 F.2d 512 (CA-2); *United States* v. *Wholesale Oil Co.*, 154 F.2d 745 (CA-10).

[44] See, e.g. *United States* v. *Vogue*, 145 F.2d 609 (CA-4), where the Court followed the principle enunciated in *NLRB* v. *Hearst Publications*, 322 U.S. 111, that the term "employee" was to be construed not by reference to "technical common-law concepts," but rather by reference to the purpose of the Act and the facts involved in the economic relation. (*Ibid*, at p. 129)

[45] *United States* v. *Aberdeen Aerie*, 148 F.2d 655 (CA-9); *Grace* v. *Magruder*, 148 F.2d 679 (CA DC), cert. den. 326 U.S. 720.

(iii) *1947-1949: The aftermath of this Court's decisions in* United States v. Silk *and* Harrison v. Greyvan Lines *(331 U.S. 704) and* Bartels v. Birmingham *(332 U.S. 126) caused Congress to amend the Code and define "employee" for the first time in unequivocal statutory language.*

Because of the varying standards applied by the lower courts, this Court in 1947 handed down two opinions in *United States* v. *Silk* and *Harrison* v. *Greyvan Lines*, 331 U.S. 704 and *Bartels* v. *Birmingham*, 332 U.S. 126.

In *Silk*, the status of two groups—coal loaders and truck drivers—was in question, while in *Greyvan* the dispute involved the status of moving van drivers. By the application of the common law test stated in the Treasury Regulations, the lower courts concluded all three groups were independent contractors.[46]

This Court upheld the Treasury's determination that the coal loaders were employees, but affirmed the lower court's judgments for the taxpayers that the truck and van drivers were independent contractors. As to the coal unloaders, this Court noted that they provided only picks and shovels, engaged in work of a menial nature for Silk who "was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held employees in tort cases." (331 U.S. at 718)

In reaching these decisions, the Court noted in *Silk* that: "No definition of employer or employee applicable to these cases occurs in the Act. * * * Nothing that is helpful in determining the scope of the coverage of the tax sections of the Social Security Act has come to our attention in the legislative history of the passage of the Act or the amendments thereto." (331 U.S. at p. 711).[47]

---

[46] *United States* v. *Silk*, 155 F.2d 356, 359 (CA-10) and *Greyvan Lines, Inc.* v. *Harrison*, 156 F.2d 412, 415-416 (CA-7)

[47] The case seemed to turn on the definition of "employment" (331 U.S. p. 712, ftn. 6), although reference was made to the dis-

Finding no basis for construction in the words of the Act itself, the Court resorted to generalities, giving emphasis to the social purposes of the legislation.

The opinion stated that while control should be a factor in the determination of the employment relationship, it was not the sole criterion. Language followed expanding the definition of "employee" beyond anything which had ever been included before, stating that the term must be understood with reference to the facts involved in the economic relationship between the employer and the hired party.[48]

A week later in *Bartels* v. *Birmingham*, 332 U.S. 126[49] this Court reiterated that the test of the relationship was not to be ascertained solely by the control factor, but in the light of economic dependence on the business to which the service is rendered.[50]

---

tinction between employees and independent contractors in the existing Treasury Regulations emphasizing control. (331 U.S. p. 713, ftn. 8)

[48] "As federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation." (331 U.S. at p. 712)

[49] Here this Court, reversing the Circuit Court, adopted the findings of the District Court which found that members of name bands were not employees of the taxpayer dance-hall operator. In reaching the result, the Court noted that the bandleader, rather than the taxpayer controlled the details of the enterprise. Not deemed decisive was the fact that under a standard form contract between the musicians' union and the dance-hall operators, the latter were specified to be the employers of the musicians and their leader and "shall at all times have complete control of (their) services. * * *" Such a contractual shift, it was held, did not authorize the Commissioner to collect taxes from those not covered by the taxing statute. (332 U.S. at 132)

[50] "* * * but in the application of social legislation, employees are those who as a matter of economic reality are dependent upon the business to which they render service." (332 U.S. at p. 130)

Prompted by language borrowed from the prefatory remarks in *Silk*[51] and the dictum in *Bartels*,[52] the executive agencies set about promulgating new regulations[53] to embody the test of "economic reality" in the light of the "total situation", instead of the narrower common law test of power to control the manner in which the work is done. See, *United States* v. *Thorson*, 282 F.2d 157, 159-161 (CA-1) and *Illinois Tri-Seal Products, Inc.* v. *United States*, 353 F.2d 216, 224-228 (Ct. Cl.). The agencies asserted that the new test was substantive and would determine the employer-employee relationship by replacing the common law test because "it is law pronounced by the Supreme Court", and "is compelled by the Supreme Court."[54]

Rejecting the agencies' proposed new regulation, the Finance Committee, without subtlety and with obvious pique at what it considered a flagrant usurpation of its legislative prerogatives by the administrative agencies, said that the argument that the Supreme Court in these cases "established new substantive law for determining an employer-employee relationship cannot be accepted. It is self-destructive, for Congress continues to have the exclusive power to make law." [S. Rept. No. 1255, Appendix B, p. 1766, *infra*.]

---

[51] See excerpt from *Silk* opinion in footnote 48, *supra*.

[52] See excerpt from *Bartels* opinion in footnote 50, *supra*.

[53] 12 Fed. Reg. 7966 (1947). Part (b) of the proposed regulation stated in part: "Whether services performed by an individual constitute him an employee as a matter of economic reality * * * is determined in the light of a number of factors * * *." To the factors listed in the existing regulation, the proposed new regulation would have added— (1) degree of control, (2) permanency of relation, (3) integration of the individual's work in the business to which he renders service, (4) skill required, (5) investment in the facilities for work by the individual and (6) opportunities of the individual for profit or loss. In sum, it literally ignored control elements and gave weight instead to the individual's economic dependence on the business to which he renders service.

[54] Sen. Rept. No. 1255, see Appendix B, pp. 1765 and 1766, *infra*.

Congress' sharp reaction to this administrative undertaking led to the enactment in June 1948 of H. J. Res. 296 [55] over the President's veto.[56] That resolution (known as the 'Gearhart resolution' "to maintain the status quo in respect of certain employment taxes and social security benefits pending action by Congress on extended social security coverage") amended §§ 1426(d) and 1607(i) of the 1939 Code to provide that the term "employee"—[57]

---

[55] 62 Stat. 438, c. 468 Pub. Law No. 642, Act of June 14, 1948, 80th Cong. 2nd Sess., resulting from H. J. Res. 296 and H. Rept. No. 1319 and S. Rept. No. 1255, 26 USC §§ 1426(d) and 1607(i) of the 1939 Code. The legislative history elaborately demonstrates Congress' rejection of the "dependency" or "economic reality" tests, at the same time reaffirming the common law rules contained in the existing Treasury regulations as applicable in determining employment relationships for social security purposes. See, Appendix B, pp. 1753-1755; 1760-1764; 1769 *infra*.

[56] See, *Illinois Tri-Seal Products, Inc.* v. *United States supra*, 353 F.2d p. 225, ftn. 12.

[57] When the resolution was before the House on the motion to pass it over the President's veto, Representative Gearhart, who was in charge, made the following statement concerning the Supreme Court decisions, the proposed Treasury regulation, and Congressional purpose underlying the resolution (94 Cong. Rec. 8189, June 14, 1948):

> However, there crept into these decisions a little of what lawyers call obiter dicta; that is, some words which were quite unnecessary to the result. These words were to the effect that, for purposes of social security, the Social Security Administration was not necessarily bound in extending the social-security coverage, by the ancient common-law definition of master and servant, or employer and employee, as you may choose to call it, but that they could take into the system as employees any persons who were dependent upon a business in the light of economic realities, thereby throwing into the entire system a confusion which required immediate legislative attention.
>
> The Social Security Administration and the Treasury proceeded immediately to prepare a departmental regulation to carry that obiter dicta definition into effect. If this Congress had not interfered, tens of thousands of people in America who never dreamed they were employed by anybody and never for one moment thought they were covered by social security or subject to payroll taxes would have found that they had been swept into the social security system by bureaucratic ukase. In other words, they would suddenly have found that they had more em-

does not include (1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

By the exclusionary language thus employed, Congress excluded from coverage not only those who had the status of an independent contractor, but without naming them, others not employees under the common law rules. This observation is relevant because the problem is considered as though there is a single alternative, that is, that the person in question must be treated either as a conventional employee or an independent contractor in the common acceptance of that term. But such reasoning ignores the language of the 1948 Gearhart amendment which "recognized that under the common law there are those other than independent contractors who are not employees." [58]

The legislative history and the wording of the provisions of the "Gearhart amendment" clearly demonstrate that the congressional intent underlying its passage was to override any notions of the application by the courts or agencies of the "economic reality" or "dependency" tests proposed. Instead, the employment relationship was to be decided "by an application of the rules of the common law with specific reference to the common law dis-

---

ployers than a dog had fleas. So, to end this confusion, this Congress acted promptly, and, after thoroughgoing debate, and by a vote of nearly 7 to 1, proceeded by legislation to put the matter in order once again by restoring the ancient doctrine of the common law defining the relation of master and servant, employer and employee.

See also *United States* v. *Thorson*, 282 F.2d 157, 161 (CA-1); *Party Cab Co.* v. *United States*, 172 F.2d 87, 90-1 (CA-7), cert. den. 338 U.S. 818.

[58] See, *Party Cab Co.* v. *United States*, 172 F.2d 87, 90 and 93 (CA-7), holding taxicab drivers were not employees. Cert. den. 338 U.S. 818. Acquiesced in by the Commissioner of Internal Revenue, 1951-2 C.B. 162-168.

tinction, hard as it sometimes is to draw, between an employee and an independent contractor." [59] The legislative expression contained in Appendix B, *infra*, pp. 1752 *et seq.* not only substantiates "but clearly and definitely emphasizes that Congress intended the words it used to mean exactly what they say." [60]

The Finance Committee Report on the resolution [61] commented that the usual common law rules were well stated in the existing regulations (as contrasted with the proposed regulation) and that the existing regulation might be considered a valid extension of congressional intent; that the "economic reality" concept was basic to the proposed regulation and the proposed regulation would, therefore, discard the common law rules for a new rule of "nebulous" and "dimensionless" character; that the proposed regulation would bring within the coverage of the Act many persons whose activities were largely or wholly free from direction as to how, and in frequent cases, as to when or whether they pursued them; and that when such services were performed without any direction or right of direction over the persons who performed them, and the persons who performed them were not in the least accountable for what they did, "then properly under existing Treasury Regulations such persons were recognized as independent contractors or self-employed in a class with independent contractors." [62]

---

[59] *United States* v. *Thorson*, 282 F.2d 157, 158 (CA-1); *Dimmitt, et al* v. *Finnegan*, 179 F.2d 882, (CA-8), cert. den. 340 U.S. 823.

[60] *United States* v. *Thorson, supra*, 282 F.2d at 158.

[61] The legislative history of the resolution was considered in *Illinois Tri-Seal Products, Inc.* v. *United States*, 353 F.2d 216 (Ct.Cl.); *United States* v. *Crawford Packing Co.*, 330 F.2d 194, (CA-5); *United States* v. *Thorson*, 282 F.2d 157, 159 (CA-1); *Dimmit, etc.* v. *Finnegan*, 179 F.2d 882, 888 (CA-8), cert. den. 340 U.S. 823; *Party Cab Co.* v. *United States*, 172 F.2d 87, 89-91 (CA-7); *Crossett Lumber Co.* v. *United States*, 79 F.Supp. 20, 23-25 (WD Ark.).

[62] Sen. Rept. No. 1255, see Appendix B, pp. 1761, 1762-1764, *infra*, and also Appendix "C" p. 1C *infra*.

The legislative history further indicates that Congress accepted the decisions of the Court in *Silk* and *Bartels* insofar as "the moving principles by which the Supreme Court reached those decisions were the usual common law tests and principles realistically applied." [63] Rejecting the random remarks which gave rise to a different interpretation, the Finance Committee Report stated:

> "Those who challenge this, and oppose with conflicting interpretations, have the unhappy burden of demonstrating that the Supreme Court has the right to make its own law in the field." [64]

Totally rejecting the agencies' proposed regulation, but adopting the results in *Silk* and *Bartels*, the Committee Report concluded:

> "A sound reading of these cases (Silk and Bartels) requires that the prefatory and random remarks of the Court which have been seized upon to supply a spurious gloss of validity to the proposed Treasury regulation shall be harmoniously related to the facts involved, the decisions, and to their moving rules; and if this cannot be done they must be regarded as surplusage.
>
> "If we were compelled to interpret these remarks of the Court we would say, in untechnical and summary fashion and without arriving at complete exposition, that the lower courts and administrative agencies were told: Don't be fooled or unduly influenced by the form of the arrangement to which you must apply the Social Security Act. Look to the real substance. Illuminate the usual common law tests by regard for all the pertinent facts. This requires that all of the realities that will lead you to the truth must be consulted and weighed along with all other significant indicators of the real substance of the arrangement.

---

[63] Sen. Rept. No. 1255, see Appendix B, p. 1766, *infra*.

[64] *Ibid*, p. 1769.

> "But this again should be said: If we have misinterpreted these decisions of the Supreme Court, if we have incorrectly called the real moving principles of these cases, if the Treasury's interpretations of the proposed regulation based upon them are correct, then by this resolution we propose to restore the usual common law rules, realistically applied." [65]

Congress' efforts were thus directed toward the establishment of a federal standard, irrespective of the "common law" of the states, for the guidance of the federal courts in determining coverage and fixing tax liabilities under §§ 3121(d) and 3306(i), Internal Revenue Code.[66]

House Report No. 2168, 80th Congress 2nd. Sess., titled "Social Security Amendments, 1948", disclosed unmistakably the congressional insistence that the common law control test apply when defining "employee" in these cases. The pertinent portion is set out at p. 9: [67]

> "Your Committee feels that although no clear statutory line of demarcation can ever be drawn which will do away with this twilight occupational zone, the Social Security Act can and should be amended nonetheless so as to keep such determinations within the reasonable limits intended by the Congress. Our

---

[65] S. Rept. No. 1255, see Appendix B, p. 1769, *infra*.

[66] The Committee Report (Appendix B, p. 1757) noted that prior to *Silk*, *Greyvan* and *Bartels*, some federal courts adopted the precedents of local law in determining the existence of an employer-employee relationship and that since these varied among the states, conflicts in decisions followed though factual determinations were not unlike. The Report added, (Appendix B, p. 1758) that properly interpreted, the Supreme Court decisions "should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act." See *United States* v. *Crawford Packing Co.* 330 F.2d 194, 195, fn. 5; and *Crossett Lumber Co.* v. *United States*, 79 F.Supp. 20, 25 (WD Ark., 1948).

[67] House Report No. 2168, dated June 2, 1948, was published twelve days before the enactment of the "Gearhart amendment" on June 14, 1948. This Report was reprinted in the Hearings of the Ways and Means Committee, 81st Cong. 1st Sess. Part 2 (H.R. 2893, Social Security Amendments of 1949) pp. 1104-1105.

failure to act may be further construed as conferring upon the administrative agencies and the courts an unbridled license to say at will whether an individual is an employee or an independent contractor. For this reason your Committee has provided in this bill that a statutory definition of the term 'employment' will be incorporated in the social security act which points unmistakeably to the common law concept of master and servant and in which the sole determining factor is the degree of direction and control retained by the employer over the work to be done and over the method of doing it. Ample flexibility is possible under such a rule to accommodate peculiar or unusual employment relationships so frequently found in our complex economic system.

"There are a number of evidentiary facts which may be shown in any given case to establish or disprove the paramount fact of control. They include such facts as the nature of the individual's compensation (whether it be profits or wages), the regularity of the service rendered, the degree of supervision involved, the extent to which tools, equipment and facilities for performing the work are supplied by the person for whom such services are rendered, the fixing of hours of work, the right of discharge, the extent to which reports and accounts are required, and so forth. There is no need, in the opinion of your Committee, to go beyond such tests in determining the ultimate employment status of a person who renders service for another. They are clear, easily proven to exist, or not to exist, and susceptible of realistic application.

"In considering these questions, the basic controlling factor is whether the policy of the Congress shall be to cover as employees only those who are employees under the common law rule, or to cover a broader class of individuals under some nebulous hypothesis with no bounds to its application. If the common law rule is to be followed and your Committee believes it should be followed, it would seem

much more satisfactory to refer to it specifically in the statute, rather than attempt to spell it out in statutory language. Spelling it out would undoubtedly produce endless litigation over the meaning of each word in the spelled-out rule.

"The common-law concept of master and servant, of course, is no more fixed and immutable than the common law itself. Hence it will produce in practice varying results under varying circumstances and in different jurisdictions. But such variations will not offend the common law rule itself. They will not nullify or afford the basis for nullifying the right of the Congress to determine the limitations of coverage under the Social Security Act."

(iv) ***1950-1953: The 1950 amendments extended coverage to include the self-employed, alleviating the problem for inventing a colorable legal theory or a practical reason to create artificial employer-employee relationships on the basis of need.***

In 1949, the Administration urged the House Committee to repeal the "Gearhart amendment" and substitute the "economic reality" test for determining who were employees. Failing that, the alternative was to include under the Federal Insurance Contributions Act (FICA) several selected occupational groups whose status was not that of "employee" under the common law rules.[68] The Senate version of the bill eliminated those proposals.[69]

A congressional compromise resulted in extending coverage to specific categories of conceded non-employees who were deliberately brought within the coverage of the Act as "statutory employees" [70] but the common law control

---

[68] Hearings, House Ways and Means Committee (H.R. 2893), 81st Congress 1st Sess., Part 2, pp. 1087-1088.

[69] S. Rept. No. 1669, 81st Cong., 2d Sess., pp. 95-97.

[70] § 3121(d)(3)(A)(B)(C) and (D), Internal Revenue Code Appendix A, p. 2A. These included persons in a variety of occupations (none of which are relevant here), such as agents or commission

test in the Gearhart amendment of 1948 "remain[s] undisturbed." [71] This compromise was part of the 1950 amendments to the Social Security Act, the main provisions of which extended coverage under the Old Age, Survivors and Disability Insurance (OASDI) program for the first time to the self-employed under SECA to the same extent as common law employees under FICA.[72]

Following the 1950 Amendments to the Act, the Commissioner of Internal Revenue issued a series of Employment Tax Rulings respecting the status of the "statutory employees" listed in § 1426(d)(3)(A)(B)(C) and (D), Internal Revenue Code, 1939 [renumbered § 3121(d)(3)(A)(B)(C)(D) of the 1954 Code], distinguishing them from common law employees, on the one hand, and the self-employed on the other.[73] The Commissioner considered that if an individual was not an employee for FICA

---

drivers distributing specified products, full time insurance salesmen, certain home workers and traveling salesmen. See, H. Rept. No. 1300, 81st Cong. 1st Sess. pp. 81-91. Fishermen were not included. The Treasury's efforts to include fishermen as statutory employees later, in 1967, was unsuccessful. See, discussion, *infra*, pp. 45-46.

[71] 64 Stat. 477, 536, c. 809. § 1426(d)(2) of the 1939 Code was slightly changed without effect defining "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." (Renumbered, § 3121(d)(2) of the 1954 Code, Appendix A, pp. 1A-2A) See, also, H. Rept. No. 1300, 81st Cong. 1st Sess. p. 80.

[72] 64 Stat. 477, 502, 540, c. 809. See, H. Rept. No. 1300, 81st Cong. 1st Sess., pp. 9-10. The 1950 amendment under discussion amended Chapter 1 of the Internal Revenue Code of 1939 by adding subchapter E, entitled "Tax on Self-Employment Income." It was referred to as the "Self-Employment Contributions Act" (SECA). It comprised §§ 480-482 of the 1939 Code. H. Rept. No. 1300, *supra*, at pp. 135-136, 140-141; S. Rept. No. 1669, 81st Cong. 2d Sess., pp. 153-154, 162.

[73] Employment Tax Rulings:

1951-1 CB 95 (full time life insurance salesmen);
1951-1 CB 97 (traveling or city salesmen);
1951-1 CB 99 (home workers)
1951-1 CB 103 (agent and commission drivers)

under the usual common law rules,[74] nor a statutory employee under FICA by virtue of the foregoing specified tests,[75] then clearly he was a self-employed person entitled to coverage under the Self-Employment Compensation Act (SECA).[76] By the agency's standards the fishermen here fall into this category. See Appendix "C", p. 1C, Social Security Handbook, § 1101, *infra*.

It becomes clear that petitioner's purpose in seeking this review was not to correct purported inequities resulting in purported denials of social security benefits to the fishermen (Petition pp. 15-16) nor to bolster "the manifest Congressional intent to apply these statutes to fishermen", (Pet. Br. p. 9) but solely to shift tax incidence from one group under the SECA (the fishermen) to another group under the FICA (the respondents and fishemen combined) for no apparent reason other than to serve the administrative convenience of the tax collector.

The Treasury Department was unsuccessful in its attempt to have fishermen legislated into the "statutory employee" category under § 3121(d)(3) Internal Revenue Code. (See discussion *infra*, pp. 45-46). Judicial

---

[74] § 1426(d)(2), Internal Revenue Code of 1939, now § 3121(d)(2), 1954 Code.

[75] § 1426(d)(3)(A)(B)(C) and (D), Internal Revenue Code of 1939; now § 3121(d)(3)(A)(B)(C)(D), Internal Revenue Code of 1954.

[76] The Self-Employment Contributions Act, §§ 480-482 of the 1939 Code, is now cited as §§ 1401 et seq. of the 1954 Code. Under § 1402(c) of the Code and the Regulations, 26 CFR § 1.1402(c)-1, "Trade or Business" is defined. Appendix p. 11A *infra*. "Thus it may be stated generally that if (the person) is not an employee for purposes of the Federal Insurance Contributions Act, as amended, the provisions of Subchapter E, Chapter 1 of the Code (Tax on Self-Employment Income) will be made applicable. Determinations whether tax liability is incurred under subchapter E, chapter 1, of the Code should be made with due regard for the applicable income tax provisions of the Code since an individual's status as a self-employed individual is initially dependent upon whether he is engaged in a trade or business." See, Rulings in ftn. 73 *supra*; and Appendix "C" p. 1C, *infra*.

aid is sought here to construe the self-employed fishermen as colorable "employees" under the "usual common law rules" in an effort to circumvent Congress.

(v) ***1954—Fishermen on vessels under 10 net tons were included under FICA and SECA, but excluded under FUTA.***

In 1954 the Social Security Act amendments pertinent here removed the exemption of salmon and halibut fishermen and fishermen on vessels under ten net tons from operation of the FICA under § 1426(b) of the 1939 Code.[17] The exemption continued under FUTA, § 1607 (c).[18] The effect was to include these fishermen with other individuals in the social security system. Their benefits and tax liabilities, like others, were determined by whether they were common law employees or self-employed persons under the statutory test. As to both, FICA and SECA, coverage for benefits was equal, only their tax liabilities were different. See, Pet. Br. p. 21.

(vi) ***1967: Congress rejected the Treasury's recommendation to amend the definition of "employee" to include fishermen under FICA.***

In 1967, shortly after the decision below was rendered in the District Court, the Treasury Department sought to amend §§ 3121(d)(3) defining "employee" to include fishermen whose commercial fishing activities were similar to those embraced in the Court's findings. (R. 315-334) The Senate Finance Report observed that the proposed amendment—

> "* * * identified captains and crew members of fishing vessels as employees for purposes of Title II of the Social Security Act * * * irrespective of the

---

[17] 68 Stat. 1052, 1054, c. 1206; 26 USC §§ 1426(b) and 1607(c); under the 1954 Code, the sections were renumbered § 3121(b) and 3306(c).

[18] *Ibid.*

common law status of these persons. The amendment thus makes it unnecessary to determine the status of these persons under the common law rules applicable to an employer-employee relationship." [79]

The opinion below observed that the proposed amendment did not pass.[80] Further, it was interesting to note that since 1950 various amendments to the Internal Revenue Code were proposed, but no attempt was made to alter the definition of "employee" in Sections 3121(d) and 3306(i),[81] nor was the status of fishermen mentioned except as noted above. Congress' reluctance to amend the definition of "employee" and the rejection of the Treasury's proposal here, indicated its intention to retain the common-law test in the statutes and regulations as the sole test for determining employer-employee relationships, whether they be maritime personnel or individuals in other occupations.

II

a. That the Captains and Crewmen were Employees of the Respondent Owners in contemplating the formers' Rights under Maritime Law is irrelevant when deciding the Respondents' Employment Tax Liability determined by the Definition of "Employee" under Sections of the Internal Revenue Code.

The Internal Revenue Code and general maritime law, separated by centuries in time and providing different rights and remedies, are both important and neither is diminished nor enhanced in significance by the other when applied to the activities of the same individual.

---

[79] Social Security Amendments of 1967, H.R. 12080, as amended by the Senate, Section 504(b)(1)(2), and Sen. Rept. No. 744, 90th Cong. 1st Sess. p. 320. Also, see opinion below (R. 363, fn. 5).

[80] [Conf. Rept.] H. Rept. No. 1030, 90th Cong. 1st Sess. p. 74, and (R. 363, ftn. 6).

[81] *Barrett* v. *Phinney*, 278 F. Supp. 65, 71 and ftn. 5 (Tex.).

Petitioner, under Point I (Pet. Br. pp. 17-25) argues that respondents' obligations to the fishermen for maintenance and cure are decisive of an employer-employee relationship under principles of maritime law. Petitioner correctly stated a principle of maritime law, but nothing more. By petitioner's analysis, the legal relation of master and servant for fixing respondents' employment tax liabilities would, without restriction, extend to the entire area of one rendering service to another by the simple device of evaluating the relationship, in some unexplained way, "according to the standards traditionally applied in the context of a particular industry." (Pet. Br. pp. 20-21).

Apparently petitioner reasons that if a fisherman is entitled to maintenance and cure, then, *a fortiori*, he is a "seaman". If he is a seaman, he is in the service of the ship and hence an "employee" of the boat owner under maritime law. But petitioner evades the issue and argues in non-sequiturs. Under general maritime law whether one is a "seaman" lies in the answer to these questions: "(a) Is the vessel in navigation? (b) Is there more or less a permanent connection with the vessel, as distinguished from a visitor or passenger? and, (c) Are the services rendered maritime in character?" Norris, *The Law of Seamen* (1962 ed.) p. 6.

The foregoing criteria, defining the term "employee" for adjusting rights and invoking remedies by interested parties in maritime jurisdiction, hardly import the traditional determinants that all agreed were essential for deciding respondents' tax liabilities here. (See Pet. Br. p. 17) The answers to the foregoing questions, defining a maritime "employee", ignore the control factor germane to the applicable common law control test. Decisive for maintenance and cure is the individual's status as a seaman and his attachment to the vessel. For a thousand years the law itself has imposed the seaman's right irrespective of his contractual arrangements with the ship-

owner. "Whether by traditional standards he (boat owner) is or is not responsible for the injury * * *, he is liable * * * as an incident of the marine employer-employee relationship." *Aguilar* v. *Standard Oil Co.*, 381 U.S. 724, 730. A term in the contract by which a seaman purported to waive his right to maintenance and cure would be unquestionably void. Gilmore and Black, *The Law of Admiralty*, 1957 ed. p. 257; *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 371.

This right is often analogized to workmen's compensation statutes,[82] state and federal. 1 *Benedict on Admiralty*, p. 55, 62. Employment relationships under workmen's compensation, to give vitality to the remedial purposes pertinent to that area of the law, import the "nature of the work test" [83] whose criteria are the antithesis of the common law rules applied in tax cases. It has often been said that, "the basic purpose for which the definition (employee) is used in compensation law is entirely different from the common law purpose." Larson, *Workmen's Compensation*, § 43.42, 1967 ed.

Petitioner would fare no better by focusing attention to a seaman's rights to recover for negligent injuries under the Jones Act.[84] The remedial purposes of that

---

[82] "The remedy (maritime) is an adequate and effective system of workmen's compensation, adequate in amount and prompt in administration." *McAllister* v. *United States*, 348 U.S. 19, 24 (separate opinion).

[83] This test consists of the analysis of the following: (1) character of the work; (2) the extent to which the worker is engaged in a separate calling; (3) how continuous or intermittent the work is; (4) whether the work is temporary or permanent; (5) importance of the work to the employer's business; and (6) the character of the relation to determine whether or not the particular employment can carry its own accident burden. The existence of the employment relationship is based on these factors without regard to whether or not the principal has the right to control the manner and method of the work being done. *Rayhill* v. *United States*, 364 F.2d 347, 355 and fn. 5 (Ct.Cl.)

[84] Merchant Marine Act of 1920, c. 250, 41 Stat. 988, Sec. 33, 46 USC § 688.

legislation require a liberal construction of "employee", undefined in the Act, favoring employment relationships to give protection where it is needed. See, *Jamison* v. *Encarnation*, 281 U.S. 635, 640. This Court has repeatedly said that the Jones Act is "an avowed departure from the rules of the common law." *Hopson* v. *Texaco, Inc.*, 383 U.S. 262, 264.

But none of these considerations have a remote bearing on the resolution of respondents' tax liabilities. The maritime cases cited at Pet. Br. pp. 18 and 22-23 discuss employment relationships and the rights and remedies flowing from them under maritime jurisdiction. The parties there were seamen, owners and others concerned in the resolution of issues involving their contracts or maritime torts. But here, the only parties are the respondent-boatowners and the United States government. The sole issue here is whether or not the boatowners owe taxes to the government. The fishermen are not parties to this suit and "have no direct interest in this controversy, nor does it appear their rights are directly affected. * * * The [fishermen's] status for other purposes is not at issue, nor would it seem they would be bound by any attempt to decide such status in a proceeding in which they are not parties." See, *Thor Co., et al* v. *United States*, 173 F. Supp. 65, 69 (Mass.) aff'd. *sub. nom., United States* v. *Thorson*, 282 F.2d 157 (CA-1). "The sole issue here is whether these [fishermen] were employees within the meaning of the pertinent federal tax statutes. This question cannot be determined by whether or not they were employees within the meaning of a * * * workmen's compensation law or [maritime law]." *Rayhill* v. *United States, supra*, 364 F.2d at 356.

Obviously, the term "employees" for purposes of recovery in maritime actions encompasses not only common law employees, but others not common law employees, who nevertheless meet the "nature of the work test" or "eco-

nomic reality" test [85] important to interpretations which give effect to remedial legislation. In this connection, because of the difference in concept between an "employee" for maritime purposes and an "employee" for federal tax purposes, an employee's (seaman's) right to maintenance and cure or Jones Act damages cannot be considered an indication that he mechanically becomes a common law employee for tax purposes. It is generally understood that an individual may be an "independent contractor" under the common law control test for "imposing vicarious liability in tort, and may be an 'employee' for the purpose of particular legislation, such as unemployment compensation." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 122. It would be no different under maritime law.

The respondents' actions here may have a maritime flavor revolving about sea-going vessels but no maritime issues are involved. Their suits are simply for the recovery of taxes erroneously paid. The provisions of the Internal Revenue Code apply, not principles of admiralty.

An axiom of statutory construction announced by this Court in *Manhatten General Equipment Co.* v. *CIR*, 297 U.S. 129, respecting tax liabilities is pertinent here. At 297 U.S. p. 135:

> "The [tax] statute defines the rights of the taxpayer and fixes a standard by which rights are measured."

The importance of understanding a tax statute was clearly stated in Griswold, *Cases and Materials on Federal Taxation* (6th ed. 1966) p. 14:

> "The *first* matter to consider in *any* tax case is: What are the words of the statute? There is no use thinking great thoughts about a tax problem unless the thoughts are firmly based on a controlling stat-

---

[85] Discussed, *supra*, pp. 35-40 and Appendix B, pp. 1762-1763 *infra*.

> ute. A certain amount of common law of federal taxation has developed, but federal taxation is not a common law subject."

Having these fundamental principles of tax law and maritime law clearly in mind, the Circuit Court below observed that "If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision." (R. 362). But noting that "The words of the statute here are clear and explicit", the Court properly determined "the relationship is to be made on the basis of the common-law tests." (R. 362)

Nothing in the tax statutes' background, history, terms or purposes indicates that the term "employee", for tax purposes, is to be evaluated according to the standards applied by the admiralty courts when resolving maintenance and cure or other issues peculiar to the maritime industry. (See Pet. Br. pp. 20-21) Nor are the sections to be administered by the Treasury Department in accordance with whatever different standards that agency may see fit to adopt for the disposition of unrelated problems. See, *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124.

Nor is there a suggestion that either the admiralty courts or the Treasury Department should abandon independent inquiry into the requirements of their separate statutes or mechanically accept standards elaborated by each other under different statutes for wholly different purposes. See, *Local 1976 U. B. C. & J.* v. *NLRB*, 357 U.S. 93, 111. Here, petitioner urges the Court to act more like a committee of Congress than a court. It asks for a strained construction of simple language long accepted and used. Not one word of legislative history supports the petitioner's views.

The affirmance of the decision below changes nothing except to require the fishermen to pay their own social security taxes under SECA (about ¾ of the total of the combined tax under FICA). This will in no way frus-

trate the policy of the maritime law which uniformly insures the fishemen's rights to maintenance and cure and preserves their remedies under the Jones Act to recover for negligent injuries, irrespective of their status as independent contractors for other purposes.

b. The administrative Ruling (SST 387) was invalid as an Attempt at Enlargement of §§ 3121(d) and 3306(i), Internal Revenue Code, thus impinging upon the congressional Prerogative of Definition.

The petitioner's reliance on SST 387 (Pet. Br. pp. 22-23) as a basis for the decision here is misplaced. That it may serve as an agency guide-line for internal administration is immaterial. It cannot and has never operated "as a long standing administrative interpretation" (Pet. Br. p. 22) binding on taxpayers. Published in 1940, SST 387 purported to construe § 1426(d) of the 1939 Code at a time when there was no definition of the term "employee" in the Act, other than to say it "includes an officer of a corporation." 49 Stat. 620, 647. It purported to adopt principles governing maritime employment relationships, incident to recovery for maintenance and cure and for negligent injuries under the Jones Act, as the definition of "employee" for tax purposes. Congress drastically amended § 1426(d) in 1948 without mentioning SST 387 either in the voluminous debates or the elaborate Committee reports. (Appendix B, pp. 1752 et seq.) SST 387 has never been construed by a court either prior or subsequent to the Gearhart amendment of 1948 which unmistakably delineated the common law control test as the sole test for defining the term "employee" in these tax considerations. Nor has the petitioner called attention to dates of construction of the definition contained in SST 387. It clearly impinged upon the congressional prerogative of definition by legislative enactment. Section 7805 of the Internal Revenue Code confers power on the Secretary of the Treasury to make rules and regulations. And although administrative regulation is en-

titled to respect, authority to make rules and regulations is not the power to make law, for no such power can be delegated by the Congress. *Dixon* v. *United States*, 381 U.S. 68, 74; *Manhatten General Equipment Co.* v. *CIR*, 297 U.S. 129, 134. "A regulation which operates to create a rule out of harmony with the statute is a mere nullity." *Ibid*, 297 U.S. at 134, citing *Lynch* v. *Tilden Produce Co.*, 265 U.S. 315, 320-322.

The meaning of §§ 3121(d) and 3306(i) and the implementing Treasury Regulations adopted by Congress as definitive here are unambiguous. The terms of SST 387 were not only contradictory, but attempted to add a supplementary legislative provision which Congress declined to enact.[86] See, *Helvering* v. *Credit Alliance Co.*, 316 U.S. 107, 113.

Apart from the foregoing, SST 387, as a mere Employment Tax Ruling coming out of the legal staff of the taxing agency, had no more legal force than the opinion of any other lawyer. It had "none of the force or effect of Treasury Decisions and [does] not commit the Treasury Department to any interpretation of the law." See, the cautionary notice published on the first page of the bulletin containing SST 387. Laying aside the fact that departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute, *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 467-468, where the law is plain, the subsequent re-enactment or amendment of a statute does not constitute an adoption of its administrative construction. *Helvering* v. *Credit Alliance Corp.*, 316 U.S. 107, 113.

What the petitioner asks here is not a construction of a statute, but an enlargement of it by the Court, so that what was omitted may be included within its scope. "To supply omissions transcends the judicial function." *Iselin* v. *United States*, 270 U.S. 245, 250-251.

---

[86] See discussion of Congress' refusal to accept the Treasury's recommendation to amend § 3121(d)(3) to include fishermen, in the opinion below (R. 363 and ftns. 5 and 6; see also, *supra*, pp. 45-46).

c. There was no Conflict between the moving Principles of the Fifth Circuit's Decision here and that of the Court of Claims reaching a contrary Result.

The petitioner bottoms its argument for reversal here (Pet. Br. pp. 16, 20) as it did in the petition for the writ (Petition, pp. 6-7, 8) on an assumed conflict of approach between the Fifth Circuit's decision below (R. 357) and the Court of Claims' decision in *Cape Shore Fish Co.* v. *United States*, 330 F.2d 961. Actually, the decisions, despite the contrary results reached, were in full accord. The varying results were due in no small measure to the difference in facts and the weight accorded them by the finder of fact. It is significant that *Cape Shore* undertook to distinguish a predecessor Fifth Circuit decision,[87] which the opinion below considered authoritative. *Cape Shore* said at 330 F.2d p. 973 and ftn. 18: "The facts in *Crawford Packing* differed in material respects from the facts here." Basically the moving principle germane to the decision in *Cape Shore* was the common law control test in the statutes and regulations (330 F.2d at 963-964) the same as it was in *Silk*, *Greyvan* and *Bartels*. (See Appendix B, pp. 1766, 1769 *infra*) But the discussions of maritime law in *Cape Shore*, like "economic reality" in *Silk* and *Bartels*,[88] were *dicta*. A number of "fisherman" employment tax cases, decided prior [89] and subsequent [90] to *Cape Shore* made no mention

---

[87] *United States* v. *Crawford Packing Co.*, 330 F.2d 194 (CA-5).

[88] Appendix B, pp. 1765, 1769, *infra*, also ftn. 48 and 50, *supra*.

[89] *Emard* v. *Squire*, 58 F. Supp. 281 (Wash.); *O'Hara Vessels, Inc.* v. *Hassett*, 60 F. Supp. 672 (Mass.) (cited as authority in *Cape Shore*).

[90] *Kirkconnell* v. *United States*, 347 F.2d 260 (Ct. Cl.) *Crawford Packing Co.* v. *United States*, 228 F.Supp. 549 (Tex.), aff'd. 330 F.2d 194 (CA-5); *Capital Trawlers, Inc.* v. *United States*, 216 F.Supp. 440, aff'd. 324 F.2d 506 (CA-1); *Star Fish & Oyster Co.* v. *United States*, 223 F.Supp. 402 (Ala.); *Williams Packing and Navigation Co.* v. *Enochs*, 176 F.Supp. 168 (Miss.), aff'd. 291 F.2d 402 (CA-5), dismissed on jurisdictional grounds, 307 U.S. 1. On retrial resulted

of maritime law. The last two cases cited in footnote 90 specifically rejected it. The Court of Claims itself ignored *Cape Shore's* maritime-oriented discussion in a later case decided under the same statutes and Regulations. See, *Kirkconnell, et al* v. *United States*, 347 F.2d 260 (Ct. Cl.)

It is noteworthy that *Cape Shore* (1964) discussed at length the control principles embraced in the statutes and regulations without a suggestion of the existence of their significant legislative history. But in 1965 and 1966, the same Court of Claims, in two employment tax cases involving applicators,[91] set out a detailed analysis of the legislative history and announced basic principles of tax statute construction alien to those discussed in *Cape Shore*. Had the Court's understanding expressed in *Illinois Tri-Seal* and *Rayhill* been applied in *Cape Shore*, the result would have been the same by virtue of the tight control exercised over the fishermen by the taxpayer-boatowner, but the maritime concept of employee would have been absent. What we have, therefore in *Cape Shore* is *dictum* from a single case whose maritime rationale is ignored by all courts, including the Court of Claims.

d. "The terms 'Employment' and 'Employee' are to be construed, not in a restricted Sense, but so as to accomplish the Purposes of the Legislation involved." [92]

The petitioner and the respondents are in accord with the statement expressed in the above caption. But they disagree respecting the application of the principles in-

---

in a jury verdict for the taxpayer. *Williams Packing Co.* v. *United States*, Civil No. 2631 (SD Miss.), filed Feb. 17, 1964; *Barrett* v. *Phinney*, 278 F.Supp. 65 (Tex.) and *Jackson* v. *Phinney*, 266 F. Supp. 635 (Tex.)

[91] *Illinois Tri-Seal Products, Inc.* v. *United States*, 353 F.2d 216 (Ct.Cl.) and *Rayhill* v. *United States* 364 F.2d 347 (Ct.Cl.)

[92] Quoted from Petitioner's Brief, p. 21, citing *Westover* v. *Stockholders Publishing Co.*, 237 F.2d 948, 951 (CA-9).

volved. Petitioner contends that "Those persons are 'employees' who, as a matter of economic reality, are dependent upon the business to which they render service."[93] This is clearly wrong. Since the "1948 Gearhart amendment" and the clear congressional purpose announced in the Committee reports, no court today is justified in espousing "economic reality" as a basis for defining who are "employees" to accomplish the purposes of the legislation involved here. We all know that the remedial aims of the Social Security Act are to provide old age insurance to individuals by a system of wage or earnings credits acquired during their productive years. Where once the Act's benefits were the exclusive preserve of the common law employee, now, they are extended to all (with a few statutory exemptions) including the self-employed or independent contractors. Had the self-employed been covered originally in 1935, or even in 1939 when it was seriously considered,[94] there would have been no colorable legal theory or practical reason for attempting to create the artificial employer-employee relationships, urged here, based on economic concepts. At any rate, the necessity for petitioner's strained and tortured construction of §§ 3121(d) and 3306(i) no longer exists and has not since December 30, 1950.

The approach of this Court in *Silk* was that "The balance in close cases should be cast in favor of coverage rather than against coverage in order to fulfill the Statute's broad and beneficient objects." [*Silk*, 331 U.S. at p. 721 (separate opinion)]. The Fifth Circuit's opinion

---

[93] Contained in *Westover* v. *Stockholders Publishing Co.*, 237 F.2d at 951, cited, Pet. Br. p. 21.

[94] Hearings, Committee on Ways and Means, 76th Cong. 1st Sess. (Soc. Sec. Amends. 1939) Vol. 1, p. 8:

> "The Board has given considerable study to the possibility of including self-employed persons under the old age insurance system. However, the Board is not prepared at this time to amend what it considers a practicable method for extending coverage to such persons."

below is consistent with those objects. It extends coverage to the fishermen under the Act as self-employed persons. See Appendix "A", pp. 8A-11A, *infra.*

The fault, perhaps, lies with the Treasury Department and the Social Security agency whose only excuse, up to 1950, for not including the self-employed was that it was not administratively feasible to cover them. [Hearings, Ways and Means Committee (H.R. 2893) 81st Cong. 1st Sess., part 2, p. 2449.] But in 1949 the Commissioner of Internal Revenue told the Committee that the experience of the past removed the barriers that existed and coverage for the self-employed could be administered with an even hand along with employees. [*Hearings, ibid,* pp. 1346, 1350-1351, 1352.] The Commissioner recommended that the "Bureau be permitted some flexibility in the matter of the type of collection system to be used * * *" and foresaw no difficulties in the long range program. [Hearings, ibid, p. 1352.]

The foregoing is clearly inconsistent with the petitioner's complaint in the Petition for the Writ at p. 15, saying: "* * * the Fifth Circuit has made it impossible to administer the Social Security and Unemployment Compensation statutes in an even-handed manner in the context of the fishing industry." And, "Further, the Social Security Administration, in paying social security benefits, is faced with a most difficult situation." (Petition, pp. 15-16) And, "The course of the decision in the Fifth Circuit poses a similar administrative dilemma for the Internal Revenue Service." (Petition, p. 17) Curiously, these various "dilemmas" were abandoned as a basis for decision in Petitioner's Brief here on the merits.

The petitioner's novel arguments urging a judicial construction of the word "employee" to include these fishermen is simply asking the Court to do, what Congress refused to do, when it rejected the Treasury's recommendation to legislate them as "statutory employees" under

§ 3121(d)(3).[95] As we said, the government's efforts are not at all directed to accomplishing the aims and purposes of the statute, but rather to gain some tactical advantage or administrative convenience for the tax collector.

e. Congress' Admonition against taking a restricted View of the Employer-Employee Relationship in making Coverage Determinations under the Social Security Act, concerned Congress' desire to give Coverage to four Categories of non-Employees, by special Amendment, leaving unchanged the Common Law Test for determining who were Employees generally.

The language in the 1950 Conference Report (Pet. Br. p. 16), relied upon by the petitioner, was not intended to expand the common law definition of employee under § 3121(d)(2) Internal Revenue Code to include non-employees. It embodied a Congressional promise to extend the OASDI program to persons other than employees. This promise was fulfilled when Congress legislated "statutory employees" into the system by adding subsections (3)(A)(B)(C)(D) to § 3121(d).[96] The self-employed were also included by the enactment of the Self-Employment Contributions Act (SECA).[97] The two Courts below recognized these distinctions in reaching their conclusions by a "realistic" application of the common law criteria in the Regulation and those noted in *Enochs* v. *Williams Packing Co.*, supra, 370 U.S. at 3.[98]

Under the decision below, the fishermen are self-employed persons. Their benefits coverage is no different, nor are their earnings credits less effective than those of

---

[95] See pp. 45-46 supra. and opinion below. R 359 and footnotes 2 and 3.

[96] See discussion *supra*, pp. 42-44 and ftn. 73.

[97] See discussion *supra*, pp. 42-45, see also Appendix "A", pp. 8A-9A, *infra*.

[98] See *supra*, pp. 23-25 and ftn. 21.

common law employees. No social or economic purpose under the statute is served by expanding the term "employee" beyond the limits fixed by Congress simply to include these self-employed fishermen as employees. By petitioner's amorphous standards respondents and others are provided no stated rule by which to determine their obligations under the Act. They must guess themselves to be subject to an uncertain rule or be at their peril which would impose administrative duties, civil and even criminal sanctions that may involve imprisonment for a felony. 26 USC § 7702. See, S. Rept. 1255, Appendix B, p. 1763, *infra*.

The questions respecting inclusions and exclusions in making determinations is for the Congress to answer, not the courts or the administrative agencies. If petitioner's broad test is adopted, then everyone who earns money performing a service for another is, by petitioner's definition, the latter's servant.

We do not deny the petitioner's basic premise of the law's capacity for growth which must include the creative work of judges. (Pet. Br. p. 14) But in the federal scheme the court's work outside of the constitutional area is modest, particularly in the freedom to create new common-law liabilities beyond the reach of the statute and Congress' clear purpose. See, *United States* v. *Standard Oil Co.*, 332 U.S. 301, 313. The tort law analogies petitioner brings forth are surely not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such. It is advanced rather as an instrument for determining federal fiscal and regulatory policies, by the shifting of tax incidence, which the government's executive arm thinks should prevail in a situation not covered by existing established tax liabilities. *United States* v. *Standard Oil Co.*, *supra*, 332 U.S. at 314. Whatever the merits of such a policy, its conversion into law is a proper subject for congressional action and not for any creative power of the Court. "Con-

gress, not this Court * * * is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs." *United States* v. *Standard Oil Co.*, *supra*, p. 314.

Moreover, Congress has been conscious throughout the history of the Social Security Act that the executive agencies have either, (1) invaded its domain by administrative fiat to effect change in defining "employees" for tax purposes, or (2) repeatedly proposed legislation for expanding the definition. At any rate, the situation is not so new that Congress can be presumed *not* to have known or acted in the light of that knowledge. The Congressional repudiation of this Court's "economic reality" test in *Silk* and *Greyvan* was acknowledged in *James* v. *United States*, 366 U.S. 213 at 231 (separate opinion) stating:

> "When Congress is dissatisfied with a tax decision of this Court, it can and frequently does act very quickly to overturn it."

A number of such instances were specified, including, "*United States* v. *Silk*, 331 U.S. 704 ('employees' for purpose of Social Security employment tax) led to Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438, amending several sections of the 1939 Code." *James*, *supra*, 366 U.S. at 231, ftn. 13.

In view of these considerations, an exercise of judicial power urged by the petitioner would not only intrude into a field properly within Congress' control, but it concerns action which Congress has seen fit not to take.[99]

---

[99] See discussion pp. 45-46 supra, and opinion below R. 359 and ftn. 2, 3.

f. Neither the absence of a demise charter nor the respondents' possible liability to third parties for acts of the crew render respondents liable for the FICA and FUTA taxes in issue.

It is petitioner's unalterable view that respondents' tax liability and their obligation to the fishermen for maintenance and cure are so intertwined that one exists only because of the other. (Pet. Br. pp. 18, 19-20). Petitioner's selection of the legal consequences of a demise charter demonstrates the fallacy of its rigid theory. (Pet. Br. pp. 19-20 ftn. 10). The demise charter shifts incidents of ownership to a charterer much like a lease of real estate shifts them from a lessor to a lessee.

Under a demise charter the charterer becomes the "employer" for purposes of liability to seamen under the Jones Act, and generally for maintenance and cure because he hires the crew. Gilmore and Black, *The Law of Admiralty* (1957 ed.) p. 218. While relevant, the absence of a demise charter is not decisive when determining "employer" status for employment tax purposes under the traditional common law rules. In less than a demise charter the nature of the contractual arrangements determine the employer-employee relationship. See, Gilmore & Black, *The Law of Admiralty*, *supra*, p. 170 re, "voyage" or "time" charters. The absence of a demise charter between the respondents and the captains does not exclude the existence of a bailment for the mutual benefit of the parties,[100] nor, under the District Court's findings[101] is a vendor-vendee relationship precluded. Neither of these relationships are consistent with one of employer and employee at common law. Petitioner's failure to distinguish the separate concepts of "employee", as they exist under a demise charter on the one hand and under tax law on the other, may lead to

---

[100] See, 8 Am. Jur. 2d, Bailments. § 4, pp. 907-908, 913, 914.

[101] Fdgs. No. 8, R. 317: No. 15, R. 320: No. 38, R. 329.

absurd results in other pursuits. It would be a strange law indeed which would first require a subcontractor in the building trades, for example, to lease the premises upon which he performed his subcontract work lest he lose his independent contractor status and become the employee of the owner. Fishermen, under the arrangements outlined in the Court's Findings below, are in no different position.

Petitioner cited several maritime cases as authority for the proposition that a boatowner may be generally liable to third parties for the acts of the crew in the absence of a demise charter. (Pet. Br. p. 24). Possibly respondents may be found liable, "[i]f so, * * * this liability would be predicated on the doctrine of estoppel, or a holding out to the public * * *. In any event these considerations are in no way determinative of the actual relationship [between respondents and the captains] for the nature of that relationship stems from the contract between the parties." *Magruder* v. *Yellow Cab Co.*, 141 F.2d 324 (CA-4).

Generally, it may be stated that while common factors (employment relationships) may emerge from maritime and tax questions, "they are, nevertheless, distinct questions involving independent considerations." See, *Local 1976, UBC & J.* v. *NLRB*, 357 U. S. 93, 111. Under the common law test one may be an independent contractor for this tax purpose, and yet, he may be an employee under maritime standards when maintenance and cure is the issue. See, *NLRB* v. *Hearst Publications, Inc.*, *supra*, 322 U.S. at 122.

g. If the Fishermen (Captains and Crewmen) are not Respondents' Employees, it does not follow that the Crewmen are the Captain's Employees.

A matter beyond the scope of this case and the record is raised by the petitioner, as a basis for decision, respecting purported tax liabilities of the captains, al-

though they are not parties to this suit. (Pet. Br. p. 22) Petitioner contends that "[i]f the owner did not have the burdens of the Social Security laws placed upon the 'employer', then the captain would have them, for he would *necessarily* be the employer of the crewmen." [emphasis added] (Pet. Br. p. 22) No authority is cited suggesting a contingent tax liability under the Federal Insurance Contributions Act (26 USC 3121 et seq.) or the Federal Unemployment Tax Act (26 USC § 3306 et seq.) The law is to the contrary. In a recent case, a Court[102] rejected the government's contention that a fishboat captain's liability for employment taxes on the crew would mechanically follow from proof of a boatowner's nonliability for such taxes on the fishermen (captains and crewmen). This was because the crewmen may not be anyone's employees. The Court held that the captain's liability for taxes, as an employer, on the crew's earnings depended solely on whether the government could establish facts bringing the captain-crew relationship within the applicable tax statute. "There is no such thing as a conditional tax statute." *Joe Grasso & Son, Inc.* v. *United States*, 42 FRD 329, 333, affirmed, 380 F.2d 749 (CA-5).

h. The Fifth Circuit's Decision below cannot jeopardize the Application of the National Labor Relations Act to any Industry.

There is no basis for petitioner's suggestion that the fishermen's status as independent contractors under the Social Security Act will disrupt the maritime industry's remedies under the National Labor Relations Act. (Pet. Br. pp. 24-25)

Several cases before the Labor Board dealt with the same issue and in nearly all instances, by our study, the Board, under similar conditions, held the fishermen were

---

[102] *United States* v. *Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (CA-5).

independent contractors and not the owners' employees.[103] These conclusions were reached although the Board found that social security and unemployment taxes were withheld and paid over.[104] Holding the fishermen were the owners' employees, the Board, in one instance, observed that employment taxes were not being withheld.[105]

In a number of cases the Department of Justice obtained indictments and successfully prosecuted violations of the anti-trust laws resulting in convictions of boatowners and fishermen. It was material to the success of the prosecutions that the indictments allege and the evidence establish that the fishermen operating the boats were not the owners' employees, but independent contractors.[106] See, *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 5 ftn. 4.

These decisions have no decisive effect in this case, but serve to attest the fact that agencies of the government are resolving similar issues in a way which is consonant with the Fifth Circuit's decision here.

The National Labor Relations Act excludes supervisory personnel from its definition of "employee". [29 USC § 152(3)]. The object of the law was to aid the wage earner, not unionize foremen. [H. Rept. No.

---

[103] *Alaska Salmon Industry, Inc.* (3 cases), 81 NLRB 1335, 82 NLRB 1056 and 110 NLRB 900; *J. Howard Smith, Inc.*, 95 NLRB 21; *F. H. Snow Canning Co., Inc.*, 118 NLRB 284; *contra, Southern Shellfish Co., Inc.*, 95 NLRB 957.

[104] See, *Alaska Salmon Industries, Inc.*, 81 NLRB 1335, 1337.

[105] *Southern Shellfish Co., Inc.*, 95 NLRB 957, 963.

[106] *Gulf Coast Shrimpers & Oystermen's Ass'n.* v. *United States*, 236 F.2d 658 (CA-5). cert. den. 352 U.S. 927 (income and social security taxes were nevertheless being withheld [p. 661]). *Local 36 of the Int'l. Fishermen's Union* v. *United States*, 177 F.2d 320 (CA-9). cert. den. 339 U.S. 947: *Atlantic Fishermen's Union, et al* v. *United States*, 197 F.2d 519 and 195 F.2d 1021 (CA-1). The indictment, Criminal No. 51-380, in the Mass. District Court, charged that the fishermen working for boatowners "are not employees, workers or laborers but independent businessmen * * *."

245, 80th Cong., 1st Sess. p. 18] Yet under the Social Security Act, such foremen or supervisors are clearly common law employees. Income withholding taxes and social security taxes must be withheld from their earnings and paid over to the District Director of Internal Revenue along with the taxes withheld from wage-earners covered as "employees" under the National Labor Relations Act. This apparent inconsistency does no violence to either the Social Security Act or the National Labor Relations Act.

Petitioner's notion that if one is an "employee" under the Social Security Act, he must be an "employee" under the National Labor Relations Act leads to absurd results. Today, under the Social Security Act, domestics are considered employees of the householders who hire them.[107] Domestics are not employees under the National Labor Relations Act.[108] The stability of neither Act has been shaken because of this inconsistency. A principle applicable here was stated by this Court in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 173:

> "* * * nor should a determination under one statute be mechanically carried over into the interpretation of another statute involving significantly different considerations and legislative purposes."

III

a. The findings and conclusions of the District Court affirmed by the Court of Appeals were amply supported by the evidence.

Petitioner submits that on the basis of the undisputed facts the decision should be reversed. (Pet. Br. p. 25). While stating that the facts are undisputed,

---

[107] § 3121(a)(7) Internal Revenue Code; 26 CFR § 31. 3121(a)(7).

[108] 49 Stat. 450 § 2, amended by § 101, 61 Stat. 127. 29 USC § 152(3).

petitioner argues, in essense, that the facts were otherwise than as found by the Court. In addition, petitioner ignores the application of the common law control test and invokes principles of workmen's compensation, citing as its sole authority Judge Learned Hand's opinion in *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, 552-553 (CA-2). (Pet. Br. pp. 25-26) Material to petitioner's case, Judge Hand there said, "the word 'employed' * * * must be understood with reference to the purpose of the Act, and where all conditions of the relation require protection, protection ought be given." (*id.* at 552) The legislation under consideration in *Lehigh Valley Coal Co., supra*, was an employer's liability statute. The protection sought was relief from economic and financial catastrophe growing out of an industrial accident. The test applied was "economic reality" or the "nature of the work" to give vitally to the purposes of the legislation. As to each, the factor of "control" was de-emphasized, if not altogether ignored.

Judge Hand's decision in *Lehigh Valley Coal Co., supra*, was not inconsistent with Judge Hand's later decisions in *Texas Co.* v. *Higgins*, 118 F.2d. 636 (CA-2), and *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715 (CA-2), in which he interpreted the same term (employee) somewhat differently under the Social Security Act. At 135 F. 2d p. 717 he said:

> "The test lies in the degree to which the principle may intervene to control the details of the agent's performance; and that in the end is all that can be said * * *."

The language of this attractive authority was adopted by the Congress as controlling in determining employer-employee relationships under the Social Security Act. See, S. Rept. No. 1255, Appendix B, pp. 1755-1756, *infra*.

Stating there was no dispute as to the facts, petitioner nevertheless ignored many of the District Court's findings and disparaged others. On agreed facts, petitioner

drew inferences inconsistent with those drawn by the Trial Court. Basically, petitioner raised questions whether the evidence sustained the Court's findings. No question raised by petitioner has an existence independent of it. The issue does not go merely to some definite disagreement with one established fact (see Pet. Br. p. 31, fn. 14), but extends to almost all the material matters found by the Court. Petitioner says, in effect, that the Trial Court ignored substantially all of the facts which the Government deemed significant. See, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 339-340.

For some reason, petitioner assumes that despite the requirements of Rule 52(a), Federal Rules of Civil Procedure, the Government is entitled to new findings. "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as other litigants." *United States* v. *Yellow Cab Co.*, *supra*, 338 U.S. at 341. Nor may findings of fact, under Rule 52(a), be casually discarded even if the facts may have been differently found. *United States* v. *Real Estate Boards*, 339 U.S. 485, 495; *United States* v. *Yellow Cab Co.*, *supra*, 338 U.S. at 342.

A finding is "clearly erroneous" only when the "reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed." *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395. "It is not enough to choose between the two permissible views." *United States* v. *Yellow Cab Co.*, *supra*, 338 U.S. at 342.

Against the background discussed in this brief, the facts, in essence, disclose an oral contract between the respondent boatowners and the captains. By its terms, the respondents relinquished control of their boats to skilled and knowledgeable captains who staffed and provisioned them at their own expense as they saw fit. Under the arrangements, the captains undertook the fishing operations without interference from the owners as to the

captain's manner, means and methods of performance. Without a guarantee of any kind, the captains agreed to conduct the operations for a season and sell their catches to the respondents on delivery at a specified fish meal processing plant. Respondents' only concern was to obtain large catches of marketable quality fish.

Subject to the necessity for delivering the catch to a plant at the end of a trip, the captains decided the hours of work and chose the areas for fishing they considered most productive.

Each captain made business decisions in his separate negotiations with the owners. The purchase price was decided after a bilateral agreement on the terms of sale. The charges for food and personal gear made against the boat were the captain's personal debts. All payments to the crewmen were the captain's responsibility based upon his separate negotiations with them. Care had to be exercised to avoid spoilage of the fish. Like other independent contractors, a captain's profit or loss was attributable, in large part, to the way in which he combined efficiency and economy in managing his vessel. A captain was paid nothing unless a catch was delivered regardless of the time or effort expended. The fish did not become the property of the respondents until delivered to the processing plant. (Fdg. 38, R. 329)

There was no indication in the Social Security Act "* * * that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution". *United States* v. *Silk, supra* 331 U. S. at 714. "Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without the assistance of independent contractors. * * * Where part of an industrial process is in the hands of independent contractors, they

are the ones who should pay the social security taxes". (*id*, at p. 714).

Control—The element of control discussed by petitioner (Pet Br. p. 26) is emphasized in the Regulations. Control of the manner and method of performance needs little discussion here. The captains' contract was to produce a specified result; the will of the respondents was represented only in the result of the work, and not in the means by which it was accomplished. *Casement* v. *Brown*, 148 U.S. 616, 622. This principle, supported by the record, gave the captains a status of independent contractors.

It was obvious from its findings that the District Court had the common law test clearly in mind. For example, it found the "respondents had no right to nor did they attempt to instruct a captain or crew as to their actual fishing activity" (Fdg. 27, R. 235); and that respondents did have the right to control the result of a captain's work and interfered in the process to some degree to assure a proper result from the undertaking." (Fdg. 46, R. 333) But, "* * * Some supervision is inherent in any joint undertaking and does not make the contributing subcontractors employees." *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 717-718 (CA-2).

Statements of witnesses attested to the independence of the captains. Typical were these: "The captains really run the show out there" (R. 112); "Yes sir, it was up to me. I was in charge of the whole thing. * * * The company didn't have nothing to do with it." (R. 224-225)

The restrictions imposed here (Pet. Br. p. 27) were natural ones that would be written by any careful owner into a contract; restrictions that would be for the protection of an owner's property. For instance, the right to forbid liquor aboard a ship is a most natural restriction in a hazardous seafaring occupation. Also, due to con-

servation laws affecting the industry, respondents were justified in warning against violations to avoid fines and possible confiscation of the catch or the boat itself.

Petitioner's emphasis on respondents' publication of crew pay scales and their requirements of crew sizes are not decisive. (Pet. Br. p. 27) The contention loses much of its force when the basis for these arrangements is understood. The necessity for the practice of fixing a crew pay scale developed from an understanding between the boatowners and captains operating in a fleet out of common plant facilities to avoid disruption caused by competitive bidding for the men's services. (R. 96-97, 98, 198 and ftn. 6 *supra*, p. 7) This practice may have had antitrust significance but would seem to have little bearing on the problem here. See, *United States* v. *Real Estate Boards*, *supra*, 339 U.S. at 490-491. At any rate, the captains frequently paid some men more if they desired.

The crew size of about 24 men was basic to safety as well as successful fishing operations where the nets had to be hauled in by hand by "bunt pullers." (R. 98) Here too, the captains increased or decreased the crew sizes within reasonable limits according to their needs. All this affected the results of the undertaking, not the manner or method of its performance.

That the captains could and did oppose the respondents and affect changes respecting the pay scales and crew size determined by the respondents indicated an independence of, or perhaps an opposition to, the wishes of the respondents. The foregoing is inconsistent with the tighter control exercised in normal employer-employee relationships. It is important "to distinguish between authoritative direction and control and mere suggestions as to details or necessary cooperation." *Standard Oil Co.* v. *Anderson*, 212 U.S. 215, 222.

Contrary to petitioner's views, the Trial Court found that the captains kept a daily payroll record of the

amounts to be paid each crewman, the latter's participation in each catch, and, the amounts to be charged against him for food and personal gear. The plant's office compiled the data into a summary record. (Compare Pet. Br. p. 27 and Fdg. 37, R. 328-329) The bi-weekly payments to the crewmen by respondents' checks were drawn from the captain's money, received for the sale of the fish, in such amounts as the captain designated. These accommodations and conveniences had no bearing on the captain's complete control over the manner and method of conducting his fishing operations. See, *Phinney* v. *Southern Warehouse Corp.*, 212 F. 2d 488, 489-490 (CA-5); *Venneri* v. *United States*, 340 F. 2d 337, 341 (Ct. Cl.).

Right of Discharge—Petitioner's emphasis on respondents' "power to terminate," as "one of the most crucial elements in the arsenal of control" (Pet. Br. p. 28), is misplaced. Primarily, petitioner's views disparage the Court's findings (Fdg. 13, R. 320, and Fdg. 47, R. 333), and are otherwise unrealistic. Petitioner says that the parties' arrangements contemplated a right in the respondents "to terminate the captains' or crews' jobs at any time for any reason * * * or without a reason." (Pet. Br. p. 28) This will not withstand analysis.

The Court found that the contract could be terminated only at the conclusion of a trip, each trip being a separate undertaking. But the evidence disclosed that no terminations occurred at any time prior to the end of a season (Fdg. 13, R. 320, Fdg. 47, R. 333), and custom dictated "it to be continued for a season." (Fdg. 13, R. 320) But apart from these considerations, a termination in mid-season would more likely initiate with a captain than a boatowner. This result would follow from his ill health, the dispersing of his crew or the disappearance of the fish. These circumstances would make further fishing impossible. On the other hand, it would be a poor business judgment for an owner "with or without a reason"

to indiscriminately discharge a captain and crew in mid-season. The only result would be to render inoperative an otherwise productive vessel. There would be little hope of finding a captain and crew organized and available at any time except at the commencement of a season.

All that appears in the evidence upon which the Government relies to support its contention is that an owner had a right not to give a captain a vessel the next season if he chose not to do so. (Fdg. 47, R. 333) "This is not the equivalent of evidence of a right to fire [a captain] from a job once he had begun to work on it. It is only evidence of the right not to enter into another contract." *United States* v. *Thorson, supra*, 282 F. 2d 157, at 164. Also, *Party Cab Co.* v. *United States, supra*, 172 F. 2d 87, 93. Other contentions made by petitioner rest on facts not found by the Court but which it says are compelled by the evidence. (Pet. Br. p. 28)

But, terminations without notice do not mechanically transform an independent contractor into an employee where there is a failure of performance as agreed upon. *Chicago, Rock Is. & Pac. Ry. Co.* v. *Bond*, 240 U.S. 449, 455. This Court held van drivers were independent contractors under the Social Security Act in *United States* v. *Silk, supra*, 331 U.S. at 709, saying: "The contract was terminable at any time."

But more important, the covenants between the owners and captains, grounded in custom, did not contemplate the captains as servants subjecting themselves to momentary superintendance. Their undertaking was distinctly one capable of independent action to be judged by results covering a "fishing season." The bonus arrangement at the outset, payment of which was held in abeyance until season's end, was inconsistent with petitioner's notions of brief or temporary employment. The captains were not mere sailors on articles at fixed wages under an owner's orders. They were independent operators, each with an organization of his own, conscious of his own

power to direct operations and negotiate the sale of the fruits of his efforts. He displayed a readiness to assume direction of an enterprise and to be judged by its results.

Petitioner's comparison of the employment of a plant superintendent of a large corporation (Pet. Br. pp. 22, 29) or a department store clerk at Christmas time (Pet. Br. p. 30) with the captains is neither similar nor analogous. Unlike the captains, neither of them sell a product they themselves harvested from the sea; nor do they, like the captains, labor long hours and possibly days without hope of reward should nature's cycles, weather or other unknown events deprive them of the object of their endeavors. Unlike the plant foreman and the clerk, the captains have no regular hours set by the company, nor wages guaranteed irrespective of production together with overtime pay on occasion. The mere existence of the branch factory (Rev. Rul. 69-315, Pet. Br. p. 29) implies an overall organization from which policy and direction as to detail emanates to assure uniformity in the organization's activity.

Investment—While relevant, the furnishing of facilities for the performance of the work is not decisive. Although the boatowners invested thousands of dollars in their vessels, yet the investment was relative as to the captains who paid a portion of the expenses of the trip (groceries and personal gear), and gave unstintingly of their time and skill without a guarantee of earnings. The disparity of money investment loses its significance knowing that the respondents incur none of the fixed labor costs found to be a major expense of operation in other occupations. It was solely the captain's problem to hire and satisfy 20 to 24 crewmen that the venture would succeed. The captain's failure to produce a catch imposed a loss of time and expense on the fishermen with no reward. The owners' cost would be only the general maintenance expenses. When the catch was large, the captains realized an agreed amount from its sale to

the owners. Out of this all crew and provision expenses were paid. The owners' expenses were still limited to the vessels' maintenance and repair. The contributions of all to the venture were great although different. Many joint undertakings are so arranged.

There are many contractual arrangements involving large investments by businesses with little or none by the independent contractor performing necessary services. The disparity, in itself, does not mechanically change the self-employed into employees.

The interpretations placed by the Commissioner of Internal Revenue upon the definition of "employee" involved here demonstrate that a taxpayer's investment in the facilities for the performance of the work is not decisive.

The Commissioner acquiesced in a number of court decisions and published his tax ruling holding taxicab drivers were independent contractors.[109] The enormous cost of the taxicabs, garage, telephone and service facilities were literally ignored in making the determinations that the drivers were independent contractors. Another group of acquiescences and a subsequent published ruling[110] held real estate salesmen were not employees. Here too, the large investment by the real estate firms in their facilities used by the salesmen had no bearing on the Commissioner's decision. The pertinent language bearing on the independent contractor status was:

> "Here we are concerned with competent salesmen, almost entirely dependent upon their own initiative, efforts, skill and personality for success, working upon their own time, at their own expense, and deriving remuneration from the results of their work." [*Dimmitt, et al.* v. *Finnegan*, 179 F. 2d 882, 888, *cert. den.*, 340 U.S. 823]

---

[109] 1951-2 Cum. Bull. 162-168.

[110] 1951-1 Cum. Bull. 108-109.

Pertinent to this issue is the decision in *Radio City Music Hall Corp.* v. *United States, supra*, 135 F. 2d 715. The Court held stage performers were not the theater's employees under the Social Security Act. When the determination was made, no weight was given to the taxpayer's huge investment in its New York theater building and facilities where the actors performed their services. (135 F. 2d at 716-717)

Another illustration, in a non-tax case was a contractee's operation of a bus terminal and facilities for a national organization. *Continental Bus System, Inc.* v. *N.L.R.B.*, 325 F. 2d 267 (CA-10). The contractee, like the captains here, hired his own workers and arranged their pay and duties. His earnings, like the captains', were derived solely from commissions on the tickets and other services sold to the public. The company provided the terminal, buses, tickets, forms and all other facilities necessary for a successful transportation operation. Under the common law control test, the contractee was held an independent contractor and not an employee of the bus company. The owners' investment in the transportation facilities far exceeded those of the respondents' in their boats; also, there was a greater measure of control exercised over the contractee than respondents would attempt over the captains.

The furnishing of a place to work, the open sea, was dictated by the presence of the fish. The actual fishing grounds were the separate choices of the captains. No greater independence than these captains pursuing their living is conceivable. It is apparent that there is still room in this world for a man to pursue an "independent calling" and yet share in the benefits granted under the Social Security Act.

Profit or Loss—Petitioner says, "The captains and crews had no opportunity to share in the profit or loss of the enterprise". (Pet. Br. p. 29). We disagree.

The captain's ability, as a businessman, to gain or lose from his own undertaking was discussed briefly at pp. 67-68, *supra*. Clearly, the captain would gain a profit or bear a loss after payment of the crew's earnings and payment of accrued expenses. This was so irrespective of a gain or loss by the respondents from their sale of the fishmeal product on the open market. (Fdg. 8, R. 318). As for the risk involved, we know of no other class of persons who risk so much in a hazardous occupation on the chance that they will realize great profits or nothing from earnest efforts. Success or failure depends upon finding the fish and harvesting them; this, in turn, depends upon weather, efficiency of the boat's gear, its capacity, the migration habits of the fish, nature's cycles and other events, some foreseeable, others not. The fishermen may return empty handed or be handsomely rewarded. There was no guarantee of any kind.

Permenance of the relationship—The District Court found that some captains fished single seasons and others consecutive seasons for various respondents, there being no pattern of continuity of relationship between particular captains and particular respondents. (Fdg. 18, R. 321-322). They were not restricted in their right to conduct similar operations for various competitors. (Fdg. 47, R. 333) The petitioner took exception to the Trial Court's findings, asserting that the evidence was to the contrary. Petitioner contends: "* * * the relationship between the captains and the owners manifested a high degree of permenance. The relationships * * * ranged up to 40 years * * *". (Pet. Br. pp. 3 and 30).

To support these contentions, petitioner studiously avoided the colloquial realities of the testimony, favoring instead selected words and phrases from the whole evidence.

The witnesses alluded to the "Wallace interests" or the "Wallace people", the "Wallace fleet", or the "Com-

pany" when discussing their fishing activities.[111] (R. 162, 163, 166, 167, 174-175, 178, 183, 184, 187, 213, 221). The boats, owned by various persons, including these respondents, operated in fleets out of one or more plants to which the fish catches were returned. It was from these plant "interests" that the witnesses testified they conducted their fishing activities for up to 40 years. (Fdg. 10, R. 318; Fdg. 11, R. 319; Fdg. 18, 321-322). Boat owners, including the respondents, come and go in the business, but the permenance of the processing plants give the menhaden business its continuity. The processing plants are not parties to this suit. (Fdg. 11, R. 318-319).

Each season was a separate and complete arrangement between the captains and respondents. (Fdg. 13, R. 320, Fdg. 20, R. 322). As to permenancy of the relationship, "* * * it can hardly be said to exist or be a weighty element where each obligation was for a comparatively short duration and the worker was free to accept or reject the offer of a new or similar obligation." *Silver* v. *United States*, 131 F. Supp. 209, 212 (N.Y.) and *Illinois Tri-Seal Products, Inc.* v. *United States*, supra, 353 F.2d at 229.

b. The Court of Appeals having treated the case as an issue of fact rather than a question of law, correctly affirmed the District Court's findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure.

Petitioner's Point III (Pet. Br. p. 31-38) frames the issue as a pure question of law, asserting that the "the Court of Appeals applied an erroneous standard for review". (Pet. Br. p. 31).

---

[111] George Wallace owned a fishmeal processing plant in North Carolina and had an interest in others in Florida and Louisiana out of which respondents' boats operated. He was the operating manager in each of them. (R. 83-84)

"I was on a boat fishing for Mr. Wallace but he did not own the boat". (R. 162).

The two Courts below having found favorably for the respondents, it is axiomatic that the trial court's findings of fact are accepted as true, that all conflicts in the evidence must be presumed to have been resolved in favor of the respondents, that the evidence otherwise must be considered in a light most favorable to the respondents and that respondents are entitled to all favorable inferences which may be drawn from the evidence and circumstances proven. "It must be a strong case in which this Court will set aside these concurrent findings of two courts." *Goodyear Tire and Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278. *Texas and New Orleans Ry. Co.* v. *Brotherhood of Railway and S. S. Clerks*, 281 U.S. 548, 557. We think this is not such a case.

The Circuit Court below affirmed the District Court on the authority of *CIR* v. *Duberstein*, 363 U.S. 728, which requires that reviewing courts must affirm unless it can be said that its basic findings were clearly erroneous under Rule 52(a) F. R. Civ. P. (R. 365).

The petitioner insists, though not too confidently, that *Duberstein, supra*, did not state a standard of review applicable to every tax case, and, that therefore "the *Duberstein* decision cannot be applied here". (Pet. Br. p. 32).

If the findings below would have been the other way, the petitioner would be here strenuously contending the issue was one of fact, and, unless "clearly erroneous", the findings should be left undisturbed by virtue of Rule 52(a). We point to at least three recent employment tax cases favorable to the Commissioner, where the taxpayers, on review, sought reversal contending as a matter of law that the Courts should have ruled the workers were independent contractors.[112] The reviewing courts in

---

[112] *Lifetime Siding Co.* v. *United States*, 359 F.2d 657 (CA-2) cert. den. 385 U.S. 921 (siding applicators); *Service Trucking Co.* v. *United States*, 347 F. 2d 671 (CA-4) (truck unloaders); *Hoosier Home Improvement Co.* v. *United States*, 350 F.2d 640 (CA-7) (window installers).

each case disagreed with the appellant-taxpayers that the employment status of the workers was a question of law.

In the cases cited in the margin (ftn. 112), the government successfully argued that employment relationships, under the Social Security Act, were issues of fact and that where the facts were not in dispute reasonable minds could differ whether the workers were employees or independent contractors. The government would then conclude by stating that the records contained probative evidence capable of supporting the decisions of the trial court. In each instance the government cited *CIR* v. *Duberstein*[113] as applicable. While leeway is accorded the Commissioner when assuming inconsistent positions in tax matters, the choice of *Duberstein* as the vehicle is not convincing.

It is urged that this case involves a "mixed" question of law and fact and as such should be treated as a question of law. (Pet. Br. p. 33-36). Whether the issues here are mixed questions of law and fact was previously considered in a fisherman tax case by the Fifth Circuit in *United States* v. *Crawford Packing Co.*, 330 F.2d 194; Holding they were not employees the court said at page 197:

> "Whether applicable statutes and regulations are such as to preclude the decision of the District Court is a question of law reviewable on appeal. So far as the fact elements are concerned, reviewing courts are bound by the clearly erroneous rule. If, as may

---

[113] *Lifetime Siding Co.* v. *United States, supra,* ftn. 112 see page 2 of Governments' memorandum in opposition to petition for a writ of certiorari, No. 461, October Term 1966. Reference is made to "(Pet. A 21)" which is the Circuit Court's opinion citing *Duberstein* at length.

Service Trucking Co. v. *United States,* supra, ftn. 112 see Government's brief, page 9, citing *Duberstein* at great length as controlling on the issue of fact.

Hoosier Home Improvement Co. v. *United States,* supra, ftn. 112 see Government's brief at pages, 14 and 31, citing *Duberstein.*

often happens in this kind of case, the facts had been found by a jury, the scope of review would be even more strictly limited by the substantial evidence rule. The Supreme Court noted in *Trust of Bingham* v. *CIR*, 325 U.S. 365, 370:

> 'And even when they are hybrid questions of 'mixed law and fact' their resolution, because of the fact element involved, will usually afford little concrete guidance for future cases, and reviewing courts will set aside the decisions of the Tax Court only when they announce a rule of general applicability, that the facts found fall short of meeting statutory requirements.'"

It cannot be said that the findings of fact here are "clearly erroneous" under the application of §§ 3121(d) and 3306(i) Internal Revenue Code. Rule 52(a) F. R. Civ. P.

Petitioner misreads *NLRB* v. *United Insurance Co.*, 390 U.S. 254 (Pet. Br. p. 34-35) as supporting plenary review to disturb the concurrent findings of two courts below. This Court overrode the Court of Appeals' decision in *NLRB* v. *United Insurance Co. supra*, and restored the findings of the original trier of fact. The Court's respect for the findings of the trier of fact made "between two fairly conflicting views" (390 U.S. at 260), is no comfort to the petitioner who asks this Court to disregard the facts and conclusions twice sifted by the two Courts below. This Court plainly indicated that determinations whether persons are employees or independent contractor are issues of fact. At *id.*, 390 U.S. p. 258:

> "There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor * * *. [T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all incidents of the relationship must be weighed with no one factor being decisive."

And concluding at *id.*, 390 U.S. p. 260:

> "Here the least that can be said for the Board's decision is that it made a choice between two conflicting views * * *."

As a basis for a *de novo* review of the facts, petitioner seeks comfort in *United States* v. *Silk*, *supra*, 331 U.S. at 716-718 and *Bartels* v. *Birmingham*, *supra*, 333 U.S. at 132 (Pet. Br. p. 36). It must be remembered that this Court sustained the District Courts and the Circuits in three out of four of the categories of workers under review.[114] Holding coal loaders were employees by application of the common law tests, this Court observed in *Silk*, 331 U.S. at 716: "Silk was in a position to exercise all necessary supervision over their [coal loaders] simple tasks". The other three categories were held not to be employees under the same common law rules. Review was granted by this Court in *Silk* and *Bartels* because "varying standards (for the determination of "employees") have been applied in the federal courts" (331 U.S. at 705), and further, "no definition of employer or employee applicable to these cases occurs in the Act". (331 U.S. at 711). Those conditions no longer exist since the "Gearhart amendment" of 1948 which legislated into existence an unambiguous definition of "employee". §§ 3121(d) and 3306(i), Internal Revenue Code, at Appendix A, pp. 1A, 2A, 4A infra. (Discussed *supra*, pp. 33-35).

Employment relationships were considered factual type cases by this Court in *Silk*, 331 U.S. at p. 721 (separate opinion). Mr. Justice Rutledge admonished against this Court's drawing final decisions in such cases saying (331 U.S. at 721):

> "Having declared the applicable principles to be applied, our function is sufficiently discharged by seeing to it they are observed."

---

[114] Coal truck drivers and furniture van drivers in *Silk* and *Greyvan* (331 U.S. 704) and musicians in *Bartels* (332 U.S. 126) held not employees of the taxpayers.

All that can be said here is that the trial judge and the Circuit Court below looked at the facts one way, while petitioner, construing them in another, asks this Court to agree with the government's view. If there is any class of cases which plainly falls outside the considerations by which this Court exercises its discretionary jurisdiction, it is those involving service relationships respecting only an interpretation of facts found by the trier of fact bearing on the existence or absence of control exercised by one individual over work performed by another.

This case presents no constitutional principle so closely connected to the facts of the case to warrant dispensing with the conventional rule of this Court which usually precludes review of the concurrent findings of two courts below. Compare, *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 404. In point see, *Corn Products Ref. Co.* v. *CIR*, 350 U.S. 46, 51 and *Comstock* v. *Group of Institutional Investors*, 353 U.S. 211, 214. Also, this Court will accept a finding as to "unreasonableness of an assessment" for public improvements concurred in by two courts unless shown to be clearly erroneous. *Road Improvement District* v. *Missouri, Pac. Ry. Co.*, 274 U.S. 188, 199. "Employee" or "independent contractor" status is no less a factual issue.

Congress admonished the executive agencies to follow the common law rules in the Treasury regulation which was basic to this Court's decisions in *Silk* and *Bartels*. In this light, the Committee Report stated that—(Sen. Rept. No. 1255, see Appendix B, p. 1758).

> "• • • properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity." (Pet. Br. p. 37).

Petitioner says this requires that all employment relationships shall be treated as questions of law free from the influence of a fact finder's discretion. (Pet. Br.

p. 37). Such reasoning, does not square with this Court's holding in *Baker* v. *Texas, Pac. Ry. Co.*, 359 U.S. 227. The issue there was whether, as a matter of law, a certain individual was an "employee" under the Federal Employer's Liability Act. This Court said, 359 U.S. at 228:

> "* * * we think it is perfectly plain that the question * * * contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. * * * Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury."

In situations where a decision is so dependent upon inferences to be drawn from the facts of each case, the desired uniformity of decision urged by petitioner can be achieved only by application of the appropriate legal rules, whether by a judge as the trier of fact or by the jury under proper instructions.

The foregoing principle is borne out by the authorities cited in petitioner's brief at pp. 37-38, demonstrating that contrary results are often reached in similar type situations. Holding fishermen were employees, *Capital Trawlers* v. *United States* [115] typically reconciled opposite conclusions reached in two Fifth Circuit cases, stating [216 F. Supp. at 445]:

> "Since each of these cases is to be governed by its special facts, cases involving different factual situations 'provide little guidance'. * * * It was materially different from the relationships held not to constitute employment relationships under the same statutes in * * * *Williams Packing and Navigation*

---

[115] Cited at Pet. Br. pp. 36-37, 216 F. Supp. 440 at 445, aff'd. *per curiam*, 324 F.2d 506 (CA-1). This case distinguished *Williams Packing and Nav. Co.* v. *Enochs*, 291 F.2d 402 (CA-5), reversed on jurisdictional grounds, 370 U.S. 1; and *United States* v. *Crawford Packing Co.*, 330 F.2d 194 (CA-5).

Co. v. *Enochs* * * * and *Crawford Packing Co.* v. *United States,* * * *."

This Court felt that the resolution of the employment status of fishermen for tax purposes was a factual issue in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 8. The government's petition for the writ in *Williams Packing Co.* argued that "The record and issues in the present case (*Williams*) poses questions of law and fact * * * which are subject to reasonable disagreement. * * *". (Vol. 32, Supreme Court Records and Briefs, October Term 1961, No. 493, Petition, p. 7, and Government Brief at pp. 23-24).

The proposed rigid and regimented doctrines for decision in employment tax cases espoused here by the petitioner were not sought by the Congress. Congress expected only a rule of reason to be applied as expressed in Sen. Rept. No. 1255, see Appendix B, at 1770, *infra*:

> "The Supreme Court prescribes lower court recognition of the Social Security Act as national legislation of national scope to be interpreted uniformly by applying the Federal rule expressed in the long-standing Treasury regulation. With this prescription, there is more assurance of uniform application of the existing regulation than could be provided by a changed regulation giving rise to new uncertainties, more varied interpretations, a larger area for litigation, greater diversity of judicial decisions".

The language of the Treasury regulation anticipated case-by-case determinations to be made in borderline cases when determining who were "employees" under the Act. At 26 CFR § 31. 3121(d)-1(c)(3):

> "Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts in each case".

The Congressional Committee considered that the common law test had a "clearly focused and practical end point" and noted that—

> "A whole field of pertinent fact * * * is available to cast its weight one way or the other. Common sense and our own experience tell us that a rule so applied will work a reasonable sifting in difficult cases." [Sen. Rept. No. 1255, see Appendix B, p. 1762, *infra*]

It is plain that Congress expected the status of "employees" for employment tax purposes in borderline cases to be resolved on a factual basis. Therefore, the petitioner's contention, that uniformity of decision in employment tax cases depends upon setting aside the judgment below (Pet. Br. p. 38), is illogical and lacks any basis in decisional law.

CONCLUSION

The judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

JOSEPH J. LYMAN
1200 - 18th Street, N. W.
Washington, D.C. 20036
Attorney for the Respondents

August 1969

APPENDIX "A"

STATUTES AND REGULATIONS

Internal Revenue Code of 1954

Sec. 3121. DEFINITIONS

* * * *

(b) EMPLOYMENT.—For purposes of this chapter, the term "employment" means any service performed after 1936 and prior to 1955 which was employment for purposes of subchapter A of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen of the United States as an employee for an American employer (as defined in subsection (h)); except that in the case of service performed after 1954, such term shall not include—* * *.

* * * *

(d) EMPLOYEE.—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person—

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;

(B) as a full-time life insurance salesman;

(C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in

the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed.

[26 U.S.C. 1964 ed. Sec. 3121]

Sec. 3306 [As amended by § 1, Act of September 1, 1954, c.1212, 68 Stat. 1130] DEFINITIONS.

* * * *

(c) *Employment.*—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * *

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except—

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register

tonnage of merchant vessels under the laws of the United States).

* * * *

(i) *Employee.*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * * *

(26 U.S.C. 1964 ed., Sec. 3306.)

Treasury Regulations on Employment Tax (1954 Code):

§ 31.3121(d)-1 WHO ARE EMPLOYEES.

* * * *

(b) Corporate officers. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details

and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) *Special classes of employees.* (1) In addition to individuals who are employees under paragraph (b) or (c) of this section, other individuals are employees if they perform services for remuneration under certain prescribed circumstances in the following occupational groups:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages

(other than milk), or laundry or dry-cleaning services for his principal;

(ii) As a full-time life insurance salesman;

(iii) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(iv) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(2) In order for an individual to be an employee under this paragraph, the individual must perform services in an occupation falling within one of the enumerated groups. If the individual does not perform services in one of the designated occupational groups, he is not an employee under this paragraph. An individual who is not an employee under this paragraph may nevertheless be an employee under paragraph (b) or (c) of this section. The language used to designate the respective occupational groups relates to fields of endeavor in which particular designations are not necessarily in universal use with respect to the same service. The designations are addressed to the actual services without regard to any technical or colloquial labels which may be attached to such services. Thus, a determination whether services fall within one of the designated occupational groups depends upon the facts of the particular situation.

* * * *

§ 31.3306(i)-1 WHO ARE EMPLOYEES

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined

upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(f) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see § 31.3306(c)-2.

[26 C.F.R. § 31.3306(i)-1]

SELF-EMPLOYMENT COMPENSATION ACT (SECA)

Sec. 1401. [formerly Sec. 480, 1939 Code]—RATE OF TAX.

(a) *Old Age, Survivors and Disability Insurance* —In addition to other taxes, there shall be imposed for each taxable year, on the self-employment income of every individual, a tax as follows: (rates)

* * * *

(b) *Hospital Insurance*—In addition to the tax imposed by the preceding subsection, there shall be imposed for each taxable year, on the self-employ-

ment income of every individual, a tax as follows: (rates)

* * * *

Sec. 1402. DEFINITIONS.

(a) *Net Earnings From Self-Employment*—The term "net earnings from self-employment" means gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this subtitle which are attributable to such trade or business * * *.

(b) *Self-Employment Income*—The term "self-employment income" means the net earnings from self-employment derived by an individual (other than a non-resident alien individual) during any taxable year; (exceptions)

* * * *

(c) *Trade or Business*—The term "trade or business" when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 162 (relating to trade or business expenses), except that it shall not include—(exclusions not material).

* * * *

(d) *Employee and Wages*—The term "employee" and the term "wages" shall have the same meaning as when used in chapter 21 (sec. 3101 and following, relating to the Federal Insurance Contributions Act).

* * * *

Treasury Regulations on Self-Employment Income.

Tax on Self-Employment Income.

§ 1.1401. (a) There is imposed, in addition to other taxes, a tax upon the self-employment income of every individual at the rates prescribed in section 1401(a) (old-age, survivors, and disability insurance) and (b) (hospital insurance). This tax shall

be levied, assessed and collected as part of the income tax imposed by subtitle A of the Code * * *.

(b) The rates of tax on self-employment income are as follows:

(1) For old-age, survivors, and disability insurance:

Taxable Year	Rate
Beginning before January 1, 1957	3

* * * *

(2) For hospital insurance:

Taxable Year	Rate
Beginning after December 31, 1965 and before January 1, 1967	0.35

* * * *

(c) In general, self-employment income consists of the net earnings derived by an individual * * * from a trade or business carried on by him as a sole proprietor * * * (exclusions and exceptions not material).

* * * *

Definition of Net Earnings from Self-Employment.

§ 1402(a)-1 (a) * * *.

(1) The gross income derived by an individual, less the deductions allowed by chapter 1 of the Code which are attributable to such trade or business.

* * * *

Self-Employment Income

§ 1.1402(b)-1. (a) *In general,* * * * the term "self-employment income" means the net earnings from self-employment derived by an individual during a taxable year. * * *

Trade or Business

§ 1.1402(c)-1. In order for an individual to have net earnings from self-employment, he must carry on a trade or business, either as an individual or as a member of a partnership. * * * The term "trade or business" shall have the same meaning as when used in section 162. * * *

APPENDIX "B"

[The original pagination of this Reprint is retained for convenience and ready reference]

80th Congress, Second Session

EMPLOYMENT TAXES AND SOCIAL SECURITY BENEFITS—STATUS QUO

For text of Act see p. 449

Senate Report No. 1255 (To accompany H.J.Res. 296)

House Report No. 1319, Feb. 3, 1948 (To accompany H.J.Res. 296)

The Senate Report repeats in substance the House Report.

Senate Report No. 1255

Reprinted from 2 U.S.Code Congressional Service & Administrative News (1948)

EMPLOYMENT TAXES AND SOCIAL SECURITY BENEFITS—STATUS QUO

For text of Act see p. 449

Senate Report No. 1255 (To accompany H.J.Res. 296)

House Report No. 1319, Feb. 3, 1948 (To accompany H.J.Res. 296)

The Senate Report repeats in substance the House Report.

Senate Report No. 1255

THE Committee on Finance, to whom was referred the bill (H.J.Res. 296) to maintain the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage, having considered the same, report thereon with amendments and, as amended, recommend that the bill do pass.

WHAT THE JOINT RESOLUTION WOULD DO

1. The joint resolution would reaffirm the unbroken intent of Congress that the usual common-law rules, realistically applied, shall continue to be used to determine whether a person is an "employee" for purposes of applying the Social Security Act.

2. The resolution would maintain the status under the act of those who, prior to the enactment of the resolution, have been given coverage by erroneous construction of the term "employee" (as defined in the resolution) if social-security taxes have been paid into the old-age and survivors' insurance trust fund with respect to the covered services.

3. The resolution would assure continued benefits to those who will have attained age 65, and to the survivors of those who will have died prior to the close of the first calendar quarter which begins after the enactment of the act and who have coverage under the system because of misconstruction of the term "employee" (as defined in the resolution) even though social-security taxes have not been paid by them or in their behalf.

4. The resolution would stop extension of coverage of the act to between a half and three-quarters of a million persons who have not been, are not now, and should not be under the act, until coverage is provided by act of the Congress.

5. The resolution would stop the plan of the Treasury Department to give to these 500,000–750,000 persons free, retroactive coverage, and thus would stop a more than one-hundred-million-dollar impairment of the old-age and survivors' insurance trust fund which has been built up out of taxes collected on the wages of those who are truly "employees" and who have paid for their coverage under the system.

6. The pending resolution would not disturb the existing Treasury regulation which construes the term "employee" in the Social Security Act harmoniously with the usual common-law rules.

7. The pending resolution will maintain the moving principles of the decisions of the United States Supreme Court in the Silk, Greyvan, and Bartels cases where, in the opinion of your committee, the Court realistically applied the usual common-law rules. But if it be contended that the Supreme Court has invented new law for determining an "employee" under the social-security system in these cases, then the purpose of this resolution is to reestablish the usual common-law rules, realistically applied.

8. The resolution preserves the integrity of the trust fund by limiting payments out of the fund to persons who are "employees" under the act by the usual common-law rules, realistically applied. It leaves to Congress the opportunity to provide coverage for independent contractors and the self-employed, who are not "employees" under the act, or to those who are "employees" and are now expressly excluded from the coverage of the act.

9. The resolution would restore to the trust fund by appropriation moneys which have been paid out of the fund in the form of social-security benefits to persons not "employees" under the act and who have not contributed social-security taxes to the fund.

HISTORY LEADING TO THE JOINT RESOLUTION

The pending joint resolution arises from problems of application of the Social Security Act in the region between what is clearly employment and what is clearly independent entrepreneurial dealing.

"Employees," or their survivors, receive the benefits paid under the act; "employers" share the taxes to provide the benefits and have weighty administrative duties. Manifestly the applicable rules determining whether a relationship is that of employer and employee, or a relationship in which the parties deal independently with each other, involve important security, and tax and cost consequences for many of our citizens.

The basic assumption since the act became operative in 1936 has been that the term "employee" in the act has its common meaning; which is to say, the usual meaning under common law.

The usual common-law rule defining an "employee" is well stated in the Treasury's regulation:

> **Who are employees.**—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done.

This regulation correctly interprets the intent of Congress when it adopted the Social Security Act.

The usual meaning is inherent

The usual meaning of "employee" is natural in the scheme of the act. This is manifest in the report of the Committee on Economic Security transmitted to the Congress with the President's message of January 17, 1935, recommending social-security legislation.

This report proposed (1) a compulsory system of old-age insurance for employed workers to be supplemented by (2) a voluntary system of Government annuities for others.

Dr. J. Douglas Brown, a member of the Committee on Economic Security now serving the Committee on Finance as member of its Advisory Council on Social Security, in 1935 presented the outlines of these complementary plans to the Congress in the following words:

> • • • This is the old-age security part of the bill:
>
> • • • A Federal plan of compulsory contributory old-age insurance to provide a means whereby employed workers with the help of their employers may insure themselves against dependent old age, and lift themselves through thrift up from the level of dependency on public or private charity in old age. • • • [This] plan is contributory and contractual and affords an annuity as a matter of right. It applies to all employed persons receiving less than $250 a month • • •.
>
> A Federal plan of voluntary old-age annuities to provide self-employed persons such as shopkeepers and farmers a means whereby they may make secure and economical provision for old age.
>
> The • • • [two] plans complement each other, one covering employed persons, the other self-employed. (Economic Security Act, Hearings, House of Representatives, 1935, p. 240.)

The Congress did not adopt the voluntary plan, but did enact the compulsory plan substantially as recommended. Under a title providing definitions the act [Section 1101(a) (6)] says, simply, that:

The term "employee" includes an officer of a corporation.

It was not necessary to go beyond this simple statement to express the intent that the usual meaning of "employee" should prevail except that the term should be taken to mean also "an officer of a corporation."

The usual meaning was accepted in the administrative regulations

At the time the act was adopted there was no doubt or dispute or question that "employee" in the act had its usual common-law meaning. The Federal Security Agency (then the Social Security Board) and the Treasury Department proceeded promptly after enactment of the act to issue their interpretative regulations and these, identical in their provisions, were substantially the same as the now-existing regulations:

REGULATION 91,[1] ARTICLE 3: WHO ARE EMPLOYEES

Who are employees.—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.

The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services.

In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Considering this regulation years later a learned judge said:

We accept Article 3 of Regulations 91 as an authoritative definition of the distinction between an "employee" and an "independent contractor"—

[1] Presently numbered Regulations 106.102.204.

it is really no more than a gloss upon the definition contained in Justice Gray's opinion in Singer Manufacturing Co. v. Rahn (132 U.S. 518, 523) * * *. The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said, though the regulation redundantly elaborates it. * * * —Judge Learned Hand in Radio City Music Hall Corp. v. U. S. (135 F.(2d), 715 (1943)).

The Congress rejected as "unwise" proposals to enlarge the ordinary meaning of employee

The intention of the Congress that "employee" in the Social Security Act should have its usual meaning under common-law rules, realistically construed, was reaffirmed when the Congress made fundamental revisions of the act in 1939 to establish the present system of old-age and survivors' insurance. The Congress at this time considered the definition of "employee" in the act and rejected a Social Security Board proposal to enlarge it so as to encroach into the field of independent contractors and the self-employed. The proposal was to broaden the definition of "employee" to:

*** * * cover more of the persons who furnish primarily personal services. The intention of such an amendment would be to cover persons who are for all practical purposes employees *but whose present legal status may not be that of an employee.* [Emphasis supplied.] At present, for example, insurance, real estate and traveling salesmen are sometimes covered and sometimes not. The Board believes that all such individuals should be covered. (Hearings, Committee on Ways and Means, House of Representatives, 1939, p. 8.)**

In answer to questions submitted in writing to the Board the Board's proposal was further defined, and limited, as follows:

Question. Do you mean by the inclusion of salesmen the inclusion of those people who are now classified as independent contractors?

Answer. The intention of this proposal is to clarify the employee relationship of certain persons who are now on the border line of coverage. There is no intention to include all so-called independent contractors (id., p. 2300).

After hearings the Committee on Ways and Means of the House of Representatives reported a bill including an amended definition of "employee" to accomplish the proposal. In its report the Committee on Ways and Means said of the proposed amendment:

***The tests for determining the (employer-employee) relationship laid down in cases relating to tort liability and other common-law concepts of master and servant should not be narrowly applied.* In certain cases even the most liberal view as to the existence of the employer-employee relationship will fall short of covering individuals who should be covered. For example, certain classes of salesmen. In the case of salesmen it is thought desirable to extend coverage *even where all the usual elements of the employer-employee relationship are wholly lacking* and where accordingly even under a liberal application of the law *the courts would not ordinarily find the existence of the master and servant relationship.* It is the intention of this amendment to set up specific standards so that individuals performing services as salesmen may be uniformly covered *without the necessity of applying any of the usual tests as to the relationship of employer and employee* (Rept. 728, 76th Cong., 1st Sess., p. 61). [Emphasis supplied.]**

The Committee on Finance, in hearings on the House-passed, amended bill, heard testimony by proponents and opponents of the amended defi-

nitions of "employee" and "employer," considering this testimony in the light of the common-law definitions of "employee" and "independent contractor" as stated in the Treasury Regulations, and deliberated on whether the term "employee" in the Social Security Act should have its meaning according to the usual principles of the common law or should be given a special statutory definition. In reporting its conclusion to the Senate the committee said:

> The House proposal to extend coverage to salesmen who are not employees has been stricken out by the Committee. It is believed inexpedient to change the existing law which limits coverage to employees * * * (Senate Report 734, 76th Cong., 1st sess., p. 75).

The committee action was explained on the floor of the Senate:

> MR. HARRISON. There is a proposal in the House bill for the extension of coverage to salesmen. Under the present law, whether a salesman is covered depends upon the test of whether he is an employee in the legal sense, and your committee believes that it would be unwise at this time to attempt any change * * *.

The Senate adopted the recommendations of the committee, the bill went to conference and the action of the Senate was upheld (Conference report, Rept. 1461, 76th Cong., 1st sess., p. 14).

By enactment of the bill the Congress adopted the rules for distinguishing "employee" and "independent contractor" set out in the Treasury Regulation.[2]

The pending resolution (H.J.Res. 296) merely affirms the existing definition of "employee" in the act and the legislative action taken in 1939 with special reference to this definition.

Lack of uniformity of Federal court decisions applying the term "employee"

In the intervening years prior to the decisions of the United States Supreme Court in 1947, a lack of uniformity developed in Federal district and circuit court decisions construing the term "employee" in the Social Security Act.

The general tendency among the lower Federal courts, when presented with the problem of determining the existence of an employer-employee relationship, was to adopt the precedents of local law. These varying among the different States, considerable conflict in lower court decisions followed even though the factual situations presented for determination were not unlike.

Moreover when the cases presented were on a claim for benefits, the courts tended to a liberal construction of the term "employee." On the other hand, when the cases were on an assessment of taxes, particularly where penalties were involved, the courts tended to construe the term "employee" more strictly.

In consequence the application of the Social Security Act has not been uniform throughout the Nation.

2 "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes are deemed to have received congressional approval and have the effect of law" [Helvering v. Winmill (59 S.Ct. 45)]. The existing regulations were specifically held to have been approved by Congress and therefore to be in conformity with the law in Jones v. Goodson (121 F.2d 176; C.C.A.10, 1941).

Conflict of viewpoints and actions of the administrative agencies

The courts have not been aided by the administrative agencies, for here too there has been serious conflict of viewpoints and actions respecting application of the act. The Federal Security Agency, which has the responsibility for administering the benefits provided by the act, has strained the meaning of "employee" to place persons on the benefit rolls and—as was revealed to your committee during its consideration of the pending resolution, and as appears certain—has "gone too far in some cases." [3]

The Treasury Department, charged with the responsibility for collecting the taxes imposed on employees and employers under the act, has proceeded with more careful view of the authority conferred by the statute—at least until recently.

Dissipation of the old-age and survivors' insurance trust fund

The discordant meanings assigned to "employee" by the two administrative agencies charged with applying the tax and benefit provisions of the Social Security Act have resulted in uncompensated withdrawals from the trust fund which has been built up from the contributions of persons who have paid social-security taxes and to which the 33,000,000 persons now insured under the act look for payment of their benefits.

This aspect of the present problem is discussed more fully further on. The pending resolution would restore the losses sustained by the fund and preserve it from further dissipation and loss.

Decisions of the Supreme Court

The conflict of decisions by Federal district and circuit courts did not manifest itself markedly until 1945. To resolve the conflict the Supreme Court assumed jurisdiction of three cases involving the coverage of the Social Security Act, handing down its decisions in these cases in June 1947. The cases are:

United States v. Silk (331 U.S. 704)
Harrison v. Greyvan Lines, Inc. (331 U.S. 704)
Bartels v. Birmingham (332 U.S. 126)

These cases are discussed at length in a following section of this report.

In the view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an "employee" for purposes of applying the Social Security Act. And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act.

But, we repeat, if it be argued that the Supreme Court decisions establish a new definition of "employee," then it is the purpose of this resolution to reestablish its meaning according to the usual common-law rules, realistically applied.

The proposed Treasury Department regulation

In November 1947 the Treasury Department proposed, and unless stopped by the Congress will make effective, a new regulation construing

[3] In the words of the testimony of the Federal Security Administrator (Hearings, Finance Committee p. 137).

the term "employee," with which it would supersede the regulation that has been in force during the period the act has been effective.

An analysis of this regulation is presented in the following pages. In a word, by unbounded and shifting criteria, it would confer in those administering the Social Security Act full discretion to include, or to exclude, from the coverage of the act any person whom they might decide to be, or might decide not to be, an "employee"; and like discretion to fasten tax liabilities and the administrative duties and costs of compliance with the act upon any person whom they might decide to be an "employer."

Moreover, at the cost of the many millions of workers who with their employers have faithfully paid for their status under the social-security system, and have the right to believe the trust fund established by the act will not be impaired or dissipated, this proposed regulation would grant retroactive, free coverage for a period of four years or more to, by the explicit statement of officials testifying to your committee, from five hundred to seven hundred and fifty thousand persons.

Need for the pending joint resolution

The situation thus outlined obviously calls for a reassertion of congressional intent regarding the application of the act, and for steps to preserve the integrity of the old-age and survivors' insurance trust fund. Both are provided in the pending joint resolution.

THE ISSUE

The issue presented by the proposed regulation is not whether the coverage of the Social Security Act ought to be extended. That is for Congress to decide.

The issue presented is whether, contrary to the intent of Congress manifested by the act and its legislative history and, in the opinion of your committee, contrary to the Supreme Court's recent decisions construing the meaning of "employee" in the act, the Treasury Department shall be allowed to make its own law as to the meaning of "employee" so as to bring within the scope of the act, by administrative regulation, persons not now covered; and whether the Federal Security Agency shall be permitted to dissipate the old-age and survivor's insurance trust fund through benefit payments to persons, not "employees" under the act, who have not, therefore, made contributions to the trust fund.

OUTLINE OF THE ARGUMENT

The following sections of this report discuss the proposed Treasury Department regulation; the Supreme Court decisions upon which the regulation, allegedly, is based; the answer afforded by the Supreme Court decisions to the arguments advanced by the Federal Security Agency in opposition of the pending resolution; the encroachment represented by the proposed Treasury regulation upon the exclusive power of Congress to extend the coverage of the act; the intended impairment of the old-age and survivors' insurance trust fund by the proposed Treasury regulation; and the situation presented by previous dissipations of the fund.

The falsity of the charges that the resolution would "retract" the coverage of the act from any entitled to its coverage and benefits will be

demonstrated in the course of these sections, and on the basis of the record of the testimony given at the hearings.

While the references throughout this report are to the proposed Treasury regulation, it ought to be noted, and emphasized, that the Treasury regulation is the joint product of the Federal Security Agency and the Treasury Department. As your committee was informed by the Federal Security Administrator in his prepared statement at the hearings:

When the Supreme Court decisions came down we quickly agreed with the Treasury Department that the existing regulations no longer adequately indicated to taxpayers and prospective beneficiaries the rules of the game. While the Court did not expressly hold the regulations invalid, they had plainly ceased to serve the function which interpretative regulations are designed to serve. Amendment seemed to all of us imperative.

The Treasury and the Federal Security Agency set up a joint drafting committee, with specific instructions to devise a regulation which would incorporate and express the results of the Court decisions. What they came up with, with only minor modifications, is the proposed Treasury decision published in the Federal Register last November (hearings, Finance Committee, p. 159).

THE PROPOSED TREASURY REGULATION

Pursuant to the Administrative Procedure Act, the Secretary of the Treasury caused to be published in the Federal Register for Thursday, November 27, 1947, a proposed regulation to be effective on January 1, 1948, redefining the employer-employee relationship for the purpose of applying social-security taxes.

Introduction of the pending joint resolution in the House and Senate followed publication of this proposed Treasury Department regulation, but only after the Department had indicated it would persist in its intentions to promulgate the regulation notwithstanding protests that followed the announcement of it.[4]

Based on unsubstantiated, guesswork estimates by the Federal Security Agency, reports were widely circulated and Members of Congress were proselyted to persuade them to believe that the pending joint resolution would "take away the social-security coverage of some half to three-quarters of a million people."

On the contrary, the fact is that the pending resolution would stay the promulgation of a proposed Treasury law-making regulation which would broaden the term "employee" to bring this additional number of persons within the scope of the act and thus dilute its protection to those who are entitled to it.

The impression was cultivated that the resolution would snatch matured benefits from this large number of persons whereas the fact is that of this number only a small fraction is now receiving social-security benefits, and their benefits are not disturbed by the pending resolution in anywise, but on the contrary are by it given authority in law.

• • • The persons who have actually retired after having reached age 65 and are drawing benefits in accordance with the interpretation we have placed upon the Social Security Act • • • is not 500,000, but the persons who are entitled to wage credits • • • as the Administrator just mentioned, we estimate amount to between 500,000 and 750,000 per-

[4] Notice of proposed rule making, Federal Register, Nov. 27, 1947, p. 7966. H. J. Res. 296 introduced Jan. 15, 1948; S. J. Res. 180 introduced Jan. 30, 1948.

sons.—Testimony of Mr. Arthur J. Altmeyer, Commissioner for Social Security, hearings, Finance Committee, April 1 and 2, 1948, page 126.

• • • That is an estimate based upon the total number of people estimated to be in this area which it is believed are not now covered.—Testimony of Mr. Adrian W. DeWind, tax legislative counsel, Treasury Department (id., p. 7).

The CHAIRMAN. • • • As to those that are on the benefit rolls, who are now eligible for benefits when they have met all of the benefit conditions, is that a large part of the four, five, six, or seven hundred thousand people, or is it a small part of them?

WITNESS. I could not even hazard a guess. My guess would be that, of the wage records that are now existing for this group of people within our agency, it is a very, very, small percentage of them.

The CHAIRMAN. So the bulk of them will come on if this regulation becomes effective?

WITNESS. That is true.—Testimony of Mr. Robert C. Ayers, Bureau of Old-Age and Survivors Insurance, Federal Security Agency (Finance Committee hearings, p. 202).

Typical of the persons which the proposed regulation would bring within the coverage of the act, in the light of the testimony at hearings before your committee, are persons who buy goods and sell them from door to door retaining for themselves the excess they secure for the goods over their cost; solicitors who take orders retaining for their services the deposits they collect when they write the order; manufacturers' representatives, commission agents, and insurance salesmen who represent several companies, are compensated by commissions, and are substantially free from direction or control over how they discharge their sales activities; advertising and newspaper and magazine subscription solicitors; artists, entertainers, and writers; mine lessees; timber cutters; lessees of sawmills; bulk oil distributors and contract filling-station operators; many subcontractors in the construction field; journeyman tailors; home workers; taxicab operators; truckers and others who occupy themselves, full time or part time, in a variety of activities which are sometimes those of an employee and sometimes are not.

Frequently these services are performed where supervision of performance is impracticable, if not impossible, and the persons who engage in these activities are largely or wholly free from direction as to how they pursue them, and, in the frequent case, as to when or whether they pursue them.

When these services are performed without any direction or right of direction over the persons who perform them, and the persons who perform them are not in the least accountable for what they do as contrasted with the much tighter accountability of wage earners and salaried workers, then under the existing Treasury regulation, and quite properly so, such persons are recognized as "independent contractors," or self-employed in a class with "independent contractors."

By the criteria of the common-law rule they are classified as such. We repeat, the usual common-law rule is well stated in the existing Treasury Regulations:

Who are employees.—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who per-

forms the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done.

Thus the inquiry when proceeding under the usual common-law rule, realistically applied, has a clearly focused and practical end point. The whole field of pertinent fact, documentary and otherwise is available to cast its weight one way or the other. Common sense and our own experiences tell us that the rule so applied will work a sensible sifting of difficult cases.

The concept of "economic reality" basic to proposed regulation

The proposed regulation discards the common-law rules for distinguishing the employer-employee relationship distilled from many decisions by many courts out of many insights of real situations, for a new rule of nebulous character.

Under the proposed regulation an "employee" is "an individual in a service relationship who is dependent as a matter of economic reality upon the business to which he renders service and not upon his own business as an independent contractor."

The rule, obviously, will not serve to make the necessary distinctions. Who, in this whole world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person? The corner grocer, clearly not an employee, is economically dependent upon his customers, his banker, his supplier. No, the economic reality test must be given sharper meanings. It has an appropriate place in the business before us and we shall come to it after reviewing what the Treasury would make of its new and completely amorphous panacea.

The Treasury in its proposed regulation provides for determining whether the employer-employee relationship exists the following factors:

1. **Integration of the individual's work in the business to which he renders service.**
2. **Investment by the individual in facilities for work.**
3. **Opportunities of the individual for profit and loss.**
4. **Permanency of relation.**
5. **Skill required of the individual.**
6. **Degree of control over the individual.**[6]

Uncertainty of the proposed new regulation

The proposed regulation specifies that the listing of the factors for determining the existence of an employer-employee relationship is "neither complete nor in order of importance."

Further it provides:

Just as the above listed factors cannot be taken as all-inclusive so too the statement of facts or elements set forth in (an amplifying) paragraph * * * cannot be considered complete. *The absence of mention of any factor, fact, or element in these regulations * * * should be given no significance.* [Emphasis supplied.]

[6] **The criteria are listed above in the approximate order of emphasis they received at the hearings before the committee in lieu of their order of statement in the published regulation.**

And further:

> No one factor is controlling. The mere number of factors pointing to a particular conclusion does not determine the result. All the factors are to be weighted for their composite effect. It is the total situation in the case that governs in the determination.
>
> One fact or element may establish or tend to establish the existence of more than one factor, and may even have an independent value of its own • • •. The weight to be given [the] factor in a particular case depends upon all the facts of that case • • •.

Thus, while purporting to specify criteria by which rights and liabilities under the act can be ascertained, the proposed regulation concerns itself mainly, as was stated to your committee by a witness at the hearings:

> • • • with making it abundantly clear that on virtually no state of facts may anyone be certain whether or not he has a tax liability until the Commissioner has made up his mind about it. The regulation states many criteria which the Commissioner may take into account but then specifically says the list is not complete, that none of the criteria are controlling, that the weight to be given any factor will vary from case to case depending upon the particular facts of each case; that even if all stated factors point to one conclusion, others not set forth, or even hinted at, may result in an exactly opposite conclusion. (Robert E. Canfield, Finance Committee Hearings, p. 166.)

Of course, all of the first five of the factors supra which are numbered and specified, and any others which are pertinent to the end-point determination of whether there is common-law control, may and should be used.

But the fatal error of the Treasury's proposed regulation is that this end-point determination of the existence or absence of control under the usual common-law rule as required by the act, as is correctly interpreted by existing regulations and by the legislative history of the act, has been subordinated and diluted and reduced to possibly inconsequential effect by making it into only one (No. 6) of the specified, numbered but completely unweighted factors, and into only one of an unlimited number of unspecified and unweighted factors which may be invented by the administrators to satisfy the exigencies of their future decisions.

The reservation of unbridled powers

The classes of persons who purportedly are entitled to the coverage of the act are not delimited so an individual within the class may know his rights and claim them. The persons upon whom the proposed regulation would impose the duties and liabilities of the act—among the latter liabilities for taxes, and civil and criminal penalties that may involve imprisonment for felony—are provided no stated rule by which to determine their obligations, and must guess themselves to be subject to the uncertain language of the regulation or be at their peril. Whether persons have the rights and obligations of coverage is made by the regulation to depend entirely upon administrative findings and determinations.

While the regulation claims benevolent objectives, its character is despotic. It reposes in the administrator unfettered discretion to apply, or to take away, the coverage of the act.

The existing regulation as contrasted with the proposed regulation is not devoid of uncertainty, but its basis is in established standards of law which frame and limit its application. These standards are both restraints

upon the subjects of the act and upon its administrators. There is nothing in the act that authorizes administrators or courts to extend its terms. Indeed, obvious jurisdictional limitations, and the protection of those who are clearly entitled to its benefits, negatives contrary assertion or practice.

The basic principle of the proposed regulation—economic reality—as has been pointed out, is a dimensionless and amorphous abstraction. Until precedents are established by administrative rulings applying the new principle in concrete cases, and the courts shall have surrounded the idea with empirical bounds, the meaning of the regulation would continue equivocal, and its application would be vagrant and capricious.

The Treasury and the Federal Security Agency admit the uninformative nature of the regulation but urge that a body of precedent will be quickly built up by administrative rulings, and a more uniform application of the act will ensue than has been possible under the existing regulation as variously interpreted by the courts.

*** * * Now I am the first to admit that these proposed regulations are not as informative as we could wish in terms of telling the public who is in the system and who is out * * *.**

In the course of its work on the proposed regulations the joint committee discussed a great many cases * * * to their surprise * * * found in nearly all cases they quickly reached a unanimity of opinion * * *.

Let me hazard this prophecy: That if these new regulations are allowed to become effective, administrative rulings under them will quickly build a body of precedent that will be more informative to the public than the rules we have tried to operate under in the past * * *.—Testimony of the Federal Security Administrator (hearings, Finance Committee, pages 159–160).

Thus there is unreserved administrative claim for functions that are, inherently, legislative and judicial.

The argument for these powers

The claim to the broad powers conferred by the proposed regulation is argued by the Federal Security Agency on grounds of the need for a liberal construction of the term "employee," and one that will apply uniformly throughout the country; as well as by asserted reasons of administrative convenience. According to the Treasury, the proposed regulations and the abandonment of the existing regulations are compelled by intervening decisions of the United States Supreme Court.

THE SUPREME COURT DECISIONS

In June 1947 the Supreme Court considered the applicable standards for the determination of employees under the Social Security Act in U. S. v. Silk and Harrison v. Greyvan Lines, Inc. (331 U.S. 704); and in Bartels v. Birmingham (332 U.S. 126).

The Silk and Greyvan cases were considered together, and are the leading decisions.[6]

[6] It does not appear whether the Court in arriving at its opinions in these cases considered the definition of "employee" in the act. In its opinions the Court refers to the definitions of "employment" and "wages" cited in the Government's brief as among the pertinent statutory provisions to be considered, but the Government's brief did not cite the definition of "employee" and the Court's opinion omits all mention of that definition. It is therefore a matter of speculation whether the Court took particular notice of the definition of "employee" that is amended by the pending joint resolution, and what the effects on its decision might have been if it did not, and had taken, note of the definition.

Prefacing its decisions in Silk and Greyvan with the statement that application of social-security legislation—

should follow the same rule that we applied to the National Labor Relations Act in the Hearst case (Board v. Hearst Publications (322 U.S. 111))[7]—

the Court observed that—

as Federal social-security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose[8]—

and that—

when the problem (of differentiating between employer and independent contractor) arose in the administration of the National Labor Relations Act * * * we rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" * * *.[9]

and recalled:

We concluded that, since the end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality.[9]

In these prefatory observations of the Court in Silk and Greyvan, and in the Hearst case primarily,[10] the Treasury Department finds the basic principle of its proposed regulation:

An employee is an individual in a service relationship who is dependent, as a matter of economic reality, upon the business to which he renders service * * *—

enlarging this vastly by the addition of—

* * * and not upon his own business as an independent contractor.

The Treasury seizes upon these prefatory remarks of the Court to promulgate its test of economic reality. It argues that the test is substantive and will determine the employer-employee relationship; that it replaces the common-law tests; that it is law pronounced by the Supreme Court. The Treasury contends that its proposed regulation is compelled by the decisions of the Court, and that the regulation does no more than implement the Court's decisions.

By the same arguments, in its report to your committee, it opposes the pending resolution which would represent additional legislative approval of the existing Treasury regulation. Its report says:

7 United States v. Silk (331 U.S. 704, 713–714.)
8 United States v. Silk (331 U.S. 704, 712).
9 United States v. Silk (331 U.S. 704, 713).
10 The Treasury also relies on Rutherford Food Corporation et al. v. McComb (331 U.S. 722), a Fair Labor Standards Act case. The Treasury looks to that part of the opinion which refers to language of the circuit court to the effect that the test for determining who is an employee is not the common-law test of control. The Supreme Court did not accept this viewpoint as a part of its own philosophy. It proceeded to make its own analysis of the facts surrounding the work of the alleged independent contractors and, looking beyond the form of the arrangement to its real substance, concluded that "independent contractor" was a mere label and the worker who had it, together with the others who worked with him, were really employees. The Supreme Court pointed out that the individuals involved worked alongside of admitted employees, that they did their work as an integral part of the production line of the business, did all their work in that one plant, were subject to the frequent supervision of the manager of the plant, and that under the circumstances of the case the money they received was equivalent to piecework wages. The moving part of the case is consistent with the realistic application of the common-law control rule.

In the first place, the proposed resolution would not maintain the status quo but would change the law as pronounced by the Supreme Court in June 1947 * * *. It would substitute the common-law rules for the principles of economic reality recently set forth by the Supreme Court as governing the determination of the employer-employee relationship for purposes of the social-security program * * *.

As we have seen, the Treasury borrows this language of the Court in its prefatory remarks in Silk and Greyvan to comfort its arguments in support of the proposed regulation. It relies also on the dictum in Bartels where it is said:

In United States v. Silk we held * * * control is characteristically associated with the employer-employee relationship, but in the application of social-legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service * * *.[11]

However the argument that the Supreme Court, in the Silk and Greyvan cases, established new substantive law for determining an employer-employee relationship cannot be accepted. It is self-destructive, for Congress continues to have the exclusive power to make law.

Moreover from what the Court proceeds to say after stating that—

application of social-security legislation should follow the same rule that we applied in the Hearst case[12]—

it appears that it was enunciating the principle that narrow and doctrinaire applications of technical concepts of tort liability do not comport with the purposes of legislation of a remedial character, and that no superseding "rule" of economic reality was intended. For by way of modification and limitation the Court proceeded immediately to say:

This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the act. The taxpayer must be an "employer" and the man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships * * *. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. *The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social-security taxes.*[13] [Emphasis supplied.]

The decisions of the Court in Silk and Greyvan and Bartels and the tests, the moving principles by which the Supreme Court reached those decisions, were the usual common-law tests and principles realistically applied. Let us demonstrate this.

In the Silk and Greyvan cases the Commissioner of Internal Revenue had proceeded under the existing Treasury regulation in the assessment of social-security taxes, and the cases were brought for recovery. The lower courts held for the taxpayers and against the Commissioner.

The Silk case involved: (1) Unloaders of coal who made themselves available in coal yards at a waiting shed, some of them floaters who came only intermittently. As carloads of coal were delivered by the railroad the unloaders unloaded them into assigned bins at an agreed

11 Bartels v. Birmingham (332 U.S. 126, 130).
12 United States v. Silk (331 U.S. 704, 713).
13 United States v. Silk (331 U.S. 704, 714).

price per ton. Also (2) truckers who owned their own trucks, paid their own operating expenses, were free to work for others, and delivered coal for Silk at a uniform price per ton.

The Greyvan case involved a formal contract between Greyvan Lines, Inc., a common carrier licensed under the Motor Carrier Act, and local operators who performed the actual service of carrying the goods. The operators were required to haul exclusively for the company, furnish their own trucks, paint the designation "Greyvan Lines" on them, hire their own truckmen, pay all expenses, provide insurance, indemnify the company for losses, and to operate subject to the control of Greyvan dispatchers and under a manual of instructions which regulated in detail the conduct of the truckmen in the performance of their duties.

In the Silk case, where the employment arrangements were informal, the moving ground for the lower court's decision was:

> **The undisputed facts failed to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers (the unloaders and truckers) as is necessary to establish a legal relationship of employer and employee between the appellee and the workers in question.[14]**

In Greyvan, where a formal contract of employment was involved, the moving ground of the decision of the lower court was:

> **The company cannot be held liable for employment taxes on the wages of persons over whom it exerts no control and of whose employment it has no knowledge. * * * While many factors in this case indicated such control as to give rise to [the employer-employee] relationship we think the most vital one is missing because of the complete control of the truckmen as to how many, if any, and what helpers they make use of in their operations.[15]**

Thus, in both the Silk and Greyvan cases, the lower courts reached their decisions by applying the common-law test of direction and control.

The Supreme Court took jurisdiction because of conflicting decisions in the lower courts:

> **Writs of certiorari were granted * * * because of the general importance * * * of deciding what are the applicable standards for the determination of employees under the act. Varying standards have been applied by the Federal Courts.[16]**

The cases were considered together. The Court decided them on the basis of the existing Treasury regulation which is framed to secure realistic application of the usual common-law rules as intended by the Social Security Act.

> *** * * The long-standing regulations of the Treasury and Federal Security Agency * * * recognize that independent contractors exist under the Act. * * * The Government points out that the regulations were construed by the Commissioner of Internal Revenue to cover the circumstances here presented.[17]**

As to the truckers in Silk and Greyvan:

> **So far as the regulations refer to the effect of contracts we think their statement of the law cannot be challenged successfully. Contracts, how-**

[14] United States v. Silk (155 F.2d 356, 359).
[15] Greyvan Lines v. Harrison (156 F.2d 412, 415–416).
[16] United States v. Silk (331 U.S. 704, 705).
[17] United States v. Silk (331 U.S. 704, 714–715).

ever, "skillfully devised," • • • should not be permitted to shift tax liability as definitely fixed by the statutes • • •.[18]

But we agree with the decisions below • • • that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small-business men. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.[19]

And as to the unloaders in Silk:

Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the act. They are of the group that the Social Security Act was intended to aid. *Silk was in a position to exercise all necessary supervision over their simple tasks.* Unloaders have often been held to be employees in tort cases • • •. [Emphasis supplied.][20]

The Court thus applied the existing regulation in deciding the truckers were independent contractors and sustained the finding of the Commissioner of Internal Revenue that the unloaders were employees in the sense of the term as set forth in the Treasury regulation.

We repeat that the existing regulations were framed to secure realistic application of the usual common-law rules as intended by Congress. We emphasize that those regulations have existed since the act became operative. They have survived several legislative revisions of the act. Therefore may be considered as valid expressions of congressional intent.

Since the Commissioner proceeded, and the Court proceeded, by applying the existing regulation, the decisions of the Court do not compel change of the regulation. Furthermore, the Court did not find that extension of the existing regulation was necessary to arrive at the conclusions it reached, and so enlargement of the regulation is not required.

On the contrary in three of the four situations presented for decision the Supreme Court held that the Treasury Department had proceeded without realistic regard for the industrial surroundings within which the act was drawn and in the light of which it was to be enforced. In two of the three situations it constricted the Treasury's application of its own existing regulation by holding that the parties involved were independent contractors rather than employees as claimed by the Treasury; and in the fourth it held that the Commissioner had exceeded his statutory authority in recognizing a contract which purported to make an "employer" of one who was not the employer in fact.

Rather than giving the Government a broader license, the decisions of the Supreme Court in Silk and Greyvan and Bartels were that the Government had overextended the powers it had under the existing Treasury regulation. Now, contrarily, and despite this rebuff, the Treasury Depart-

[18] United States v. Silk (331 U.S. 704, 715).
[19] United States v. Silk (331 U.S. 704, 719).
[20] United States v. Silk (331 U.S. 704, 716–718).

ment brings forward a proposed regulation that would give the Department authority to make the very type of interpretations rejected by the Supreme Court. Rather than implementing the Supreme Court decisions, the proposed Treasury regulation attempts to surmount, supersede, and negative them.[21]

The doctrine of the Supreme Court in Silk, Greyvan, and Bartels, as reflected by its disposition of the specific situations presented in those cases, is an applied expression of the following statement of congressional intent in the legislative history:

The tests for determining the (employer-employee) relationship laid down in cases relating to tort liability, and other common-law concepts of master and servant, should not be narrowly applied (H.Rept. No. 728, 76th Cong., 1st sess., p. 61).

Our interpretations of these decisions is strongly fortified by the fact they are brought into accord with the act, the legislative history of the act, and with the administrative regulations which have acquired force of law. Those who challenge this, and oppose with conflicting interpretations, have the unhappy burden of demonstrating that the Supreme Court has the right to make its own law in the field.

A sound reading of these cases requires that the prefatory and random remarks of the Court which have been seized upon to supply a spurious gloss of validity to the proposed Treasury regulation shall be harmoniously related to the facts involved, the decisions, and to their moving rules; and if this cannot be done they must be regarded as surplusage.

If we were compelled to interpret these remarks of the Court we would say, in untechnical and summary fashion and without aiming at complete exposition, that the lower courts and administrative agencies were told: Don't be fooled or unduly influenced by the form of the arrangement to which you must apply the Social Security Act. Look to the real substance. Illuminate the usual common-law control tests by regard for all the pertinent facts. This requires that all of the realities that will lead you to the truth must be consulted and weighed along with all other significant indicators of the real substance of the arrangement.

But this again should be said: If we have misinterpreted these decisions of the Supreme Court, if we have incorrectly called the real moving principles of these cases, if the Treasury's interpretations and the proposed regulation based upon them are correct, then by this resolution we propose to restore the usual common-law rules, realistically applied.

UNIFORMITY OF APPLICATION OF THE ACT PROMOTED BY SUPREME COURT DECISIONS APPLYING THE EXISTING REGULATION

The moving principles of the decisions of the Supreme Court in Silk, Greyvan, and Bartels, if we have interpreted them correctly, likewise pro-

21 The rule of the Hearst case has been repudiated by the Congress. "• • • Although independent contractors can in no sense be considered to be employees, the Supreme Court in NLRB v. Hearst Publications (322 U.S. 111) • • • refused to consider the question whether certain categories of persons whom the Board had deemed to be 'employees' were not in fact and in law really independent contractors. The House bill contained a clarifying provision to the effect that no individual was to be considered an employee for the purposes of the act unless he was employed by an employer as defined by the act • • •" (and) excluded from the definition of 'employee' any person having the status of independent contractor (conference report, H. R. 5020, H. Rept. No. 510, 80th Cong., 1st sess.). The conference report followed the House bill (cf. p. 33). Therefore, the Treasury Department proposes simultaneously to override the Congress' intent.

vide answer to the arguments of the Federal Security Agency for a rule of common application promotive of more uniform coverage of the act than the varying standards reflected in past decisions of Federal district and circuit courts.

The Supreme Court prescribes lower court recognition of the Social Security Act as national legislation of national scope to be interpreted uniformly by applying the Federal rule expressed in the long-standing Treasury regulation. With this prescription, there is more assurance of uniform application of the act by continued application of the existing regulation than could be provided by a changed regulation giving rise to new uncertainties, more varied interpretations, a larger area for litigation, greater diversity of judicial decisions.

IRRELEVANCY OF MAJOR ARGUMENT OF FEDERAL SECURITY AGENCY IN OPPOSITION TO THE RESOLUTION

The major argument asserted by the Federal Security Agency against the pending joint resolution is that the resolution intends to reenact the past restrictive decisions of the lower Federal courts. In the words of the Federal Security Administrator:

What disturbs me the most about House Joint Resolution 296 is this line of decisions * * *. As nearly as we can judge * * * it seems to be the intention of the sponsors of the resolution to reenact the restrictive court decisions I have referred to * * *.

This argument is based upon false premises. As stated in the report of the Committee on Ways and Means of the House:

The purpose * * * is to apply the rule of the existing regulations that an independent contractor under the usual common-law rules is not an employee.

In determining whether an individual is an independent contractor, the existing regulations apply the usual common-law test of control, irrespective of the law of the particular State. It is the purpose of the regulation to reaffirm this rule * * * (Rept. No. 1319, 80th Cong., 1st sess., p. 5).

INTERFERENCE WITH LEGISLATION BY THE CONGRESS TO EXTEND THE COVERAGE OF THE ACT

The extension of the coverage of the Social Security Act is a matter of great interest in the Congress.

Pursuant to Senate resolution the Senate Finance Committee has established a distinguished Council to survey the act and recommend improvement. The Council is busily at work and has recommended extension of the coverage of the act to the self-employed.

The proposed regulation will predetermine the bounds of that class, or confront the Congress with the undesirable alternative of another change in the status of the persons whose position is affected by the proposed regulation.

As recently as 18 months ago the Federal Security Agency, recognizing that any change in the definition of employee was the exclusive prerogative of the Congress, made the following recommendation in its report to the Congress:

Employer-employee relationship.— * * * It is important that contributors and administrative agencies know as precisely as possible what services and what wage payments are subject to contributions.

It would be desirable that the word "employee" be defined by statute so as to include all service relationships that fall short of being independent businesses. A statutory definition, amplified by suitable regulations, should provide a greater measure of certainty than even the most liberal judicial interpretation—as great a measure as can be attained in dealing with relationships so diverse as those under which one person performs service for another. If self-employment is covered, such a statutory test of the employment relation would afford a dividing line between the two modes of coverage that would be realistic and would be understandable by the man in the street. If self-employment continues to be excluded, it would limit the exclusion to persons who, in a substantial sense, are in business for themselves (Annual Report, Federal Security Agency, 1946, p. 453).

PRACTICAL EFFECTS OF THE PROPOSED REGULATION

1. Compliance difficulties

Persons having no right of direction or control over "employees" constituted such by the proposed regulation would nevertheless have to assume the responsibilities imposed by the act for accurate records showing the amount and time within which the services were performed and specifying exactly the remuneration received by such "employees." Reports on the withholding tax would have to be made and filed with the Bureau of Internal Revenue by such persons with respect to such "employees." Timely tax remittances, and supply of other information would be required.

In instances of failure to comply with the procedures of the law and regulations, persons assigned the status of "employers" by the proposed regulation—but having no right and no practical means to direct or control those who, under the new concept, would become their "employees"—would nevertheless be subject to the penalties that apply to employers generally, including delinquency assessments and civil and criminal penalties, the latter involving imprisonment for felony.

The following excerpt from testimony at the hearings relating to door-to-door salespersons points up some realities which make the proposed regulation unfeasible:

We are at a loss to know how it would be within our power—no matter what expense we might be willing to undergo—to obtain accurate records on 12,000 or more individual salespeople, because we have no way of knowing what any individual receives from the sale of our hosiery.

We do not know whether she raises or lowers the suggested commission, or whether she waives the commission entirely. We have no right to compel salespeople to report to us, nor any way to check the accuracy of such reports if * * * made.

A considerable percentage of our salespeople would have difficulty in preparing a properly informative report.

If a salesperson carries lines other than ours, we have no way of knowing what portion of her business expenses are properly allocated to our line.

As a matter of fact, we seriously doubt the ability of the salesperson properly to make this allocation herself.

Our salesperson may choose to sell as many orders or as few orders as she pleases, or for which she has the disposition, time, or energy. She may suspend or resume her operations when and if she chooses * * *. There are many instances where * * * we are out of touch with her

for long periods of time.—Statement of Philip Adler, Jr., president, American Hosiery Mills, Indianapolis, Ind. (hearings, Finance Committee, p. 78).

The proposed regulation would shift to the newly and erroneously constituted "employers" the administrative difficulties which the Treasury Department advanced in opposing extension of coverage when the subject was considered in prior years.[22]

2. Interference with long-standing relationships

To sustain the obligations of an "employer," changes would be forced in long-standing relationships that are natural in their industrial environment and which are, as the Supreme Court observed in Silk, a part of the surroundings with a view to which the act was drawn. This is another way of saying that businesses long established and which have been built up by distribution of their products through relationships other than those of employer and employee would have to change their distribution systems so as to use those who truly are employees, or if this is not feasible, to go out of business. The alterations of these relationships will tend to import other liabilities under other unrelated laws.

3. Levy of the Federal unemployment tax

About 25 States have standards for inclusion in their unemployment insurance laws which, if applied, might embrace some or all of the activities which the proposed regulation would bring under the act. But according to testimony presented at hearings few, if any, of the persons who would be embraced by the proposed regulation are now covered under State unemployment insurance laws. In these circumstances the proposed regulation will serve to levy a Federal tax,[23] unrelated to the provision of Federal old-age and survivors insurance, exceeding the tax imposed for the latter purpose on both employer and employee combined—a tax imposed upon employers alone.

4. Increased litigation and appeals for legislation

The uncertainty of the proposed regulation and the seriousness of its effects will burden the courts with increased litigation and the Congress with the task of enacting new legislation to allay the impacts of something invalid and unnecessary to begin with.

DISSIPATION OF THE TRUST FUND

It is a cardinal principle of the act that its benefits are paid, not as charity, but as a matter of right to persons who have contributed what the law requires toward the receipt of those benefits. Persons who are not "employees" in the ordinary sense of the term, who therefore have not paid taxes under the act, should not, in principle, share the benefits with those who are covered by the act and who have contributed the funds from which the benefits are paid.

The past practices of the Federal Security Agency and the proposed

[22] Economic Security Act, Hearings, House of Representatives, 1935, pp. 901-904, 911; Social Security Act amendments of 1939, Hearings, House of Representatives, p. 2112.

[23] Under the Federal Unemployment Tax Act, sec. 1607(i), Internal Revenue Code.

Treasury regulation thus take on added significance. An important question is raised whether the integrity of the social-security system is being maintained.

The proposed regulation would subject the persons brought under the act to the social-security tax appropriated to the Federal old-age and survivors trust fund only on wages paid on and after January 1, 1948. On the other hand, the proposed regulation would give these newly covered persons social-security coverage dating back to 1944 and, in an uncertain number of cases, beyond.

In a letter by the Acting Secretary of the Treasury Department, dated January 30, 1948, to the chairman of the Committee on Ways and Means of the House of Representatives, it is estimated the employers' and employees' taxes which would be collected by the force of the new regulation would be "close to $25,000,000 annually." [24]

It is an actuarial certainty that social-security taxes at current rates represent less than the value of annuities and insurance benefits to which the taxes are appropriated. Accordingly the proposed retroactive grant of coverage, without any offsetting contribution of taxes, represents a potential donation of more than $100,000,000 from the funds in the Federal old-age and survivors insurance trust fund which have been accumulated for the payment of benefits to persons who have contributed to the fund.

What is proposed has already occurred, although to a lesser extent. The Federal Security Agency for some time past has established wage credits and paid benefits to persons from whom the Treasury Department has consistently refused to collect social-security taxes on the grounds they were not covered by the act.

For example your committee is advised of one case in which persons having selling relations with more than 200 companies received letter determinations from the Federal Security Agency granting them coverage under the act, although the Treasury Department has consistently refused to collect social-security taxes.

The number of persons who have received benefit payments without contribution of taxes, according to information furnished by the Federal Security Agency to your committee, is at least 5,000. The amount paid out to these persons has not been specified.

Thus what has been done, and what it is proposed to do by the new regulation, poses serious questions whether the trust fund to which the more than 33,000,000 persons now insured under the act look for the payment of their benefits is being preserved for the purposes to which it is dedicated.

The pertintent provisions of law establishing the trust fund are as follows:

FEDERAL OLD-AGE AND SURVIVORS' INSURANCE TRUST FUND

SEC. 201. (a) There is hereby created on the books of the Treasury of the United States a trust fund to be known as the "Federal Old-Age and Survivors' Insurance Trust Fund" (hereinafter in this title called the

[24] Under the Federal Insurance Contributions Act alone. Unmentioned is the $37,500,000 in taxes which would be collected annually from employers under the Federal Unemployment Tax Act, in addition to their half-share of the above-mentioned $25,000,000. The $37,500,000 might become subject to off-set by contributions under State unemployment compensation laws, but this is speculative.

"Trust Fund"). The Trust Fund shall consist of the securities held by the Secretary of the Treasury for the Old-Age Reserve Account and the amount standing to the credit of the Old-Age Reserve Account on the books of the Treasury on January 1, 1940, * * * and, in addition, such amounts as may be appropriated to the Trust Fund as hereinafter provided. There is hereby appropriated to the Trust Fund for the fiscal year ending June 30, 1941, and for each fiscal year thereafter, out of any moneys in the Treasury not otherwise appropriated, amounts equivalent to 100 per centum of the taxes (including interest, penalties, and additions to the taxes) received under the Federal Insurance Contributions Act and covered into the Treasury. There is also authorized to be appropriated to the Trust Fund such additional sums as may be required to finance the benefits and payments provided under this title.

(b) There is hereby created a body to be known as the Board of Trustees of the Federal Old-Age and Survivors' Insurance Trust Fund (hereafter in this title called the "Board of Trustees") which Board of Trustees shall be composed of the Secretary of the Treasury, the Secretary of Labor, and the Federal Security Administrator, all ex officio. * * * It shall be the duty of the Board of Trustees to—

(1) Hold the Trust Fund * * *.

* * * * * * * * * * * * *

(f) The Managing Trustee is directed to pay from the Trust Fund into the Treasury * * * (expenses) * * * for the administration of Title II and Title VIII of this Act, and the Federal Insurance Contributions Act.

* * * * * * * * * * * * *

(g) All amounts credited to the Trust Fund shall be available for making payments required under this title.

The above provisions were introduced into the law in 1939 excepting the last sentence of section 201 (a) which was added by the Revenue Act of 1943.

When the act was adopted in 1935, constitutional doubts dictated the separation of the benefit and tax titles, without allocation of the revenues from social-security taxes to the payment of the benefits provided by the act. The Supreme Court, in Helvering v. Davis (301 U.S. 619, 640–45 (1937)), which decided the constitutionality of the old-age insurance provisions of the Social Security Act, sanctioned appropriation of the special tax imposed by the act to finance the provided benefits. This was followed in the action of the Congress in amending the act to make the appropriation provided by section 201 (a) set out above.

Your committee described the 1939 amendment as follows:

Section 201: This section creates a Federal old-age and survivors' insurance trust fund in place of the present old-age reserve account, which is abolished by these amendments. * * * Amounts equivalent to 100 percent of the taxes received under the Federal Insurance Contributions Act (formerly title VIII of the Social Security Act) are permanently appropriated to the trust fund, and old-age and survivors' insurance benefits will be paid out of the fund. This should clarify the relationship between contributions under the social-security program in the form of taxes and the source of benefit payments (S.Rept. 734, 76th Cong., 1st sess., p. 41).

The Federal Security Agency recognized the intended correlation of benefits and taxes in its report to the Congress dated November 1, 1940:

The coverage provisions of the old-age insurance benefit title of the Social Security Act and of the Federal Insurance Contributions Act are identical in terms. Procedures in uniform application of those provisions by the Board and the Bureau of Internal Revenue had previously been in-

augurated but an intensified effort has been made during the year to implement these procedures and to adapt them to new interpretations necessitated by amendments to the act as well as to new cases arising under original or unchanged coverage provisions.

In this effort the Board has maintained that the benefit and tax provisions were intended by Congress to be, and have been generally accepted by the public as being one contributary social insurance program rather than separate benefit and tax programs, and that the legislative objective of a single coordinated program must be borne in mind in approaching all administrative problems involving coverage of this program, notwithstanding the vesting of administrative jurisdiction in two separate agencies of the Federal Government (Fifth annual Report of the Social Security Board (1940), p. 42).

In successive annual reports, through its report for the fiscal year 1946, the Agency referred to the coordinate responsibilities of the two Departments charged with administration of the act, and to the importance of resolving conflicting viewpoints respecting coverage.

Therefore, it is difficult to reconcile the conflicting actions of the Agency in granting wage credits and disbursing benefits when the Treasury Department, proceeding under identical definitions and under interpretative regulations phrased in the same words, had ruled in the same situations that the services performed were not employment under the coverage of the act.

The case, it should be emphasized, is not that where, because of mistake of law or evasion on the part of the employer, persons within the definitions of the act are paid benefits although social-security taxes have not been paid with respect to the wage credits on which the benefits are based. These are risks which are distributed over the covered group in consonance with the ordinary principles of group insurance, and the spread of these risks is in the mutual benefit.

The case is, rather, that persons outside the group which has contributed to the old-age and survivors' insurance trust fund have been paid benefits out of the fund by the action of one administrative agency, while the other administrative agency has ruled they were not within the coverage of the act and had neither the obligation nor the privilege of contributing to the fund.

APPENDIX "C"

U. S. Department of Health, Education, And Welfare, Social Security Administration: Social Security Handbook—SS1-135 February, 1969, Chapter 11—

§ 1101. A "trade or business" for social security purposes means the same as when used in § 162 of the Internal Revenue Code of 1954, relating to income taxes. However, certain occupations and the self-employed activities of the members of certain religious sects who have been granted exemptions from the self-employment tax are not included in the term "trade or business" for social security coverage purposes, or are included only if certain conditions are met.

"Trade or business" is not specifically defined in § 162 of the Internal Revenue Code. However, certain guides for deciding whether a trade or business exists have been set forth in court decisions and Internal Revenue Service rulings. Briefly stated, these guides are:

A. The activity is started and carried on in good faith with the intention of making a profit or producing income.

B. The activity has been regularly carried on; that is, there has been a continuity of operation, a continual repetition of transactions, or a regularity of activities.

C. The activity is the person's regular occupation or calling which he carries on to make a living or profit.

D. The person holds himself out to the public as being engaged in the selling of goods and/or services.

Any one of these factors standing alone is not enough to show that a trade or business exists. On the other hand, not all the factors need be present.